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WHISTLEBLOWER PROTECTION ACT OF 1986

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE

OF THE

COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

COMPLETED

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ON

H.R. 4033

A BILL TO AMEND TITLE 5, UNITED STATES CODE, TO STRENGTHEN THE PROTECTIONS AVAILABLE TO FEDERAL EMPLOYEES AGAINST PROHIBITED PERSONNEL PRACTICES, AND FOR OTHER PURPOSES

FEBRUARY 20 AND 21, 1986

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WHISTLEBLOWER PROTECTION ACT OF 1986

THURSDAY, FEBRUARY 20, 1986

House of Representatives,
Subcommittee on Civil Service,
Committee on Post Office and Civil Service,
Washington, DC.

The subcommittee met, pursuant to call, at 1:08 p.m., in room 304, Cannon House Office Building, Hon. Patricia Schroeder (chairwoman of the subcommittee) presiding.

OPENING STATEMENT OF CHAIRWOMAN PATRICIA SCHROEDER

Mrs. Schroeder. Today we begin hearings on H.R. 4033, the Whistleblower Protection Act of 1986. This legislation, which was introduced on January 22 by myself, and Representatives Horton, Sikorski, and Dymally of this subcommittee, now has 66 cosponsors. I am very pleased by this strong indication of congressional support for the encouragement and protection of whistleblowers.

H.R. 4033 culminates a year of careful study by the subcommittee on the issue of whistleblower protection. We held a series of hearings last spring, directed a study by the General Accounting Office, and elicited the views of hundreds of whistleblowers, attorneys, advocates, and Government officials. The general consensus was that the law must be changed if we are to treat Federal employees fairly and provide relief for victims of prohibited personnel practices.

In recent months, a situation has been unfolding that bears witness to the tremendous problem whistleblowers face. Loretta Cornelius was Acting Director of the Office of Personnel Management [OPM] when she was asked to testify before the Senate Governmental Affairs Committee on the reconfirmation of Dr. Donald J. Devine as the Director of OPM. During questioning, she revealed that Dr. Devine had secretly tried to continue running the civil service after his term had expired, a fact which she had just recently uncovered. Ms. Cornelius went on to state that Dr. Devine had asked her to lie to the Senate committee and say that she had known about his delegation of authority. Ms. Cornelius' disclosures to the Senate committee resulted in Dr. Devine withdrawing his name from consideration for the OPM position.

Since this episode last June, Ms. Cornelius has been the target of anonymous allegations about official impropriety, excluded from agency meetings, and asked to resign. Two weeks ago, she received a letter from the White House firing her.

This is an especially unusual whistleblowing case in that it involves high level Government officials, congressional oversight, and

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media attention. Yet, it is typical in that it is one more instance of a conscientious Federal employee daring to tell the truth and suffering severely for it.

With this administration so bold as to retaliate against Ms. Cornelius in so public a case, it is easier to believe that reprisals are regularly taken against whistleblowers in cases that never receive general notice.

This is a difficult issue with complicated law. Yet, our desire to provide protection to whistleblowers is genuine. I am eager to hear the suggestions of our witnesses on how to further improve the proposed legislation to achieve our goal of better, fairer government.

I appreciate the fact that the Special Counsel and representatives of the Department of Justice and the Office of Personnel Management are here today to testify. I have read all of their testimony and find that a number of their suggestions are very good and should be included in the legislation.

I must say, I was very distressed to learn that the Chairman of the Merit Systems Protection Board declined to testify or make anyone available from the agency to testify on this bill. H.R. 4033 makes fundamental changes in the way this agency operates. A responsible agency head would inform Congress of the effect of the legislation. I can only conclude that the Merit Systems Protection Board has no opinions, one way or the other about the bill.

I would also like to state that staff memos purporting to be the opinion of the Board, when the head of the Board won't come up here, won't work.

We ask each witness to summarize for 7 minutes or less their specific concerns with the legislation. We'll then open up for questions. We are interested in your specific recommendations for the bill, H.R. 4033.

I am pleased that the very distinguished ranking member of this subcommittee is here, Congressman Horton, and I'm sure you have an opening statement. Let me yield to you at this time.

Mr. HORTON. Thank you, Madam Chairman. I have a very short statement.

It is a pleasure to join you today for these hearings on H.R. 4033, the Whistleblower Protection Act of 1986. As your principal cosponsor, I look forward to the testimony being presented today and tomorrow by our distinguished witnesses.

H.R. 4033 is the product of countless hours of hearings, testimony, and input from a number of sources. I commend you for your continued commitment to improve the system of whistleblower protection and for development of this bill.

We have a number of mechanisms in place to improve Government efficiency. Inspectors general and the General Accounting Office in particular are doing an excellent job in ferreting out waste, fraud, and abuse. I believe this legislation adds another dimension to the overall effort to improve Government operation. It improves the protections afforded individuals who report instances of mismanagement and who are subjected to reprisals for these reports.

Once again, I join you in welcoming our witnesses. I look forward to their testimony.

Thank you.

Mrs. **Schroeder**. Thank you very much.

Let's call the first witness to the table, the Honorable K. William O'Connor, Special Counsel of the Office of Special Counsel, Merit Systems Protection Board. We welcome you and we are delighted that you're here. Your entire statement will be put in the record. Again, if we could have a 7-minute summary, that would be very helpful.

STATEMENT OF K. WILLIAM O'CONNOR, SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD

Mr. O'Connor. Thank you, Madam Chairwoman. I appreciate the statement being made a part of the record. It is very voluminous and I could find no way to do justice to the significant topic here raised by your committee without writing such a long statement. So I apologize for the length but appreciate it being put in the record.

Please let me begin by saying I join with the chairwoman and the honorable senior member from the Republican side in concern for the proper disposition of matters involving whistleblowers. The support of the administration for whistleblowers has been consistent, uniform, and required of me and of every executive appointed by the President, be it a Presidential appointment and confirmed by the Senate, or be it a Schedule C or anybody else. That is part of what we're supposed to do and I, for one, take it seriously. I am glad the Congress does, too.

I also have to spend a moment saying thank you for the amount of time and effort this subcommittee is putting into an issue which involves, of course, as to what whistleblowers may disclose, vast amounts of money, but also, as a necessary consequence, focuses on perhaps the smallest law enforcement agency in Government; namely, the one I head at the present time, which is 86 people and about $4.5 million. I appreciate the attention.

Now, I heard the chairwoman say that there was a general consensus that there ought to be an amendment in order to enhance protections. I must begin by separating my own views and those of my agency as to what the Government ought to do, from the general consensus. I do not believe that this agency shares in that general consensus. We certainly favor the protection of the bona fide whistleblower and we certainly wish to see the law executed and the law enforced. But I don't believe that I could support this bill, for a number of reasons:

The first is it won't work. The second is it is very expensive, at least three or four times what our present costs are, and third, I think it is really mislabeled as a Whistleblower Protection Act. I think what it actually does is create a legal service corporation for Federal employees and finances a civil service attorney representative civil relief act, while it destroys the law enforcement effectiveness of the Office of Special Counsel and disrupts every agency and merit system protection now available, without dealing with the elements of proof, which are the focus of any kind of legislative change that would modify protection for whistleblowers. At very best, it would accelerate bureaucratic entropy. I have some strong feelings about the positive nature of bureaucratic entropy, so maybe that's OK. But I do not think it would do anything except create a legal service corporation.

Let me look for a moment at what we have and where we're going under the proposed bill. Under the existing system, which is a bifurcated system, as you know, we provide discipline for the violator and restitution under corrective action for the victim, when available and possible. I think if you look at what's happened now you would see there have been significant changes. But the law hasn't changed. Always I must preface everything I say by my constant view that more law is not what makes the country work better; it's enforcement of laws, interpretation of laws, and then careful revision.

We have only just begun to enforce the law that the Congress enacted in 1978, in a credible fashion. In 1982, when I became Special Counsel—and as you know, Madam, I am concluding my term on June 3, 1986—so when I became Special Counsel in October 1982, one of my peers called me aside and said, "I understand you're going to head the gang that can't shoot straight." I smiled. Another of my peers said, "Why, O'Connor, do you want to mess with those Keystone Cops?" I said, "Never mind, it's a job that needs to be done." A third of my colleagues said, "You know, this is the team we love to beat."

Well, at that time that was pretty true, but it's not true any longer. At the time I took over this job as Special Counsel, OSC had been through a very bad time. From 1979, in January, until October 1982, it hadn't won a case, except some Hatch Act stuff. It hadn't won anything. It had brought six diciplinary actions—and there they are on the board there, six of them. We lost all six. Since then we have brought 31. As you see, we won most of them, and a couple of them we lost. That is what has happened with the law, as you in the Congress designed it, once a properly disciplined investigative and prosecutive force began to function.

Now, that is 45 months with six failures, as compared with 40 months with 31 successes, or almost successes, since we have two that were not. I wonder whether that doesn't bespeak a need for further review before anyone conducts additional legislation. I wonder if perhaps that ought not be the way we look at the law. Rather than add more law, let's see what we've got.

I would also point out that there were things done in the last few months that have never been done before in the Office of Special Counsel. Two sex discrimination cases have been prosecuted as disciplinary actions; and corrective action was secured in various ways other than by litigation in those matters.

A religious disciplinary case was brought, and perhaps as you saw yesterday, the Post reported that there had been a victory by a recommended decision in that case involving some people who discriminated against Jews in a case involving the Defense Department. Now, when you see that sort of thing happening, and you see the potential for a race case that may come later, maybe it's time to wait a little bit.

I would say quickly that corrective actions have been obtained in a number of cases where we've gotten these disciplinary actions. The appendix to the testimony enumerates a variety of those—I think it's appendix B, but I'm not sure. If you look at the appendix you will see in a number of cases that's been done.

And it doesn't show things that happen informally by way of corrective action. For example, in the last month there was what amounted to a whistleblower case in an agency. I telephoned over to the Assistant Secretary for Administration and said we have a little problem and we're going to have to do something about it. The facts that we have indicate (a) a stay is required, and (b), one of your executives needs to be sanctioned. What happened was an immediate response. A magic circle, if you will, was thrown around the person who had been mistreated and they were restored immediately, that day, to their position. The other person who had undertaken the violation was appropriately chastised and the agency at large was admonished not to do this sort of thing.

Now, why did that work a month ago? I'll tell you what, it didn't work in October 1982 because I tried it in the *Savitz* case and I tried it in some other cases. I couldn't get to first base. The reason it worked last month, and didn't work then, is that now there is a credible deterrent in place. The credible deterrent is the fear of successful prosecution by people who work in the agencies. They know that if we find something wrong they will be brought to book; and they should be.

Now, I think it would also be well to take a moment to think about what the whistleblowing is that we deal with. If you look at the chart that has been placed on the board, you will see that there were 1,884 matters—that's the intake of the Office of Special Counsel—between October 1984 and January 1986. October 1984 is arbitrary. It happens to be a point of a good statistical base beginning as to which there can't be any problems with our number systems because the computer is really clean. That took some work, too.

If you look at that, you will see that out of 1,884 complaints received, 90 are disclosures for whistleblowing, down there in the blue, in the lower chart, around 270 degrees. That is people who came in, blew the whistle, often anonymously, agencies were required to take action and did. There are 303 reprisals-for-whistleblowing allegations in the 16-month period covered here.

Now, of those 303 allegations of reprisals for whistleblowing, we closed 220 as of today. The rest are open. Now, the 220 that were closed are illustrative of the kind of a problem that actually exists, if any. If you will look at the appendix, which is quite long, it lists every one of these 220 and gives you a brief of what the facts were when the investigation was completed in the closure. So, you will see why we closed them.

But look. Fifty-nine of them were closed because there was no nexus. That means there was no connection between the alleged reprisal and the asserted whistleblowing, no connection at all. Perhaps the person had fallen afowl of discipline before they blew the whistle; perhaps they blew the whistle and no one knew about it. But anyway, no nexus. In 58 more there was no nexus and there were other problems as well with the case, because often a case that goes bad goes bad for a number of reasons.

Another large category was the disclosure wasn't protected, 27 of those. For 15 there was no personnel action taken. In 13 there was no jurisdiction.

Now, you can see the small numbers elsewhere, but there are 12 where the complainant didn't even respond to us when we undertook the investigation. That means that we're dealing with a very small number of closed complaints as to which anyone could raise any question at all—and please have the GAO look at all 220 of those files. They are available, they are current, and they will tell you what's there. There is nothing there or we would have gone ahead.

I assure you that the prosecution of anyone who trespasses upon a whistleblower within the jurisdiction of this office will follow just as the night follows the day as long as I or my senior staff now are in place there. I think any successor will do the same thing.

If that's why they were closed. Let's think about what we see here and the bill that has been presented to Congress. In the bill that's been presented to Congress there is no dealing with nexus, there is no dealing with significant factor, there is no dealing with presumption of regularity, and there is no dealing with a variety of the evidentiary issues which actually control the screen of whether you prosecute a whistleblower case or not.

You see, not all whistleblowers are angels, and not all bad things that happen to whistleblowers are reprisals. Sometimes things happen to whistleblowers because they have done something that they shouldn't have done and they ought to be disciplined and they shouldn't be protected, unless the Congress wishes to draw another kind of magic circle and, let's say, establish what might be called an informant's privilege. That would be anybody who was an informant is privileged against any other action. If you wanted to do that, then I suppose you could ensure that anyone who made an informant disclosure would be protected.

What I am trying to explain to you is that the ones who are legitimate whistleblowers are protected. There aren't very many people who say they are whistleblowers, and of those who we have looked at in the last 16 months, more than two-thirds have been closed because the law would not permit or allow any undertaking, and a law which would not permit and allow any undertaking has not been changed, or even approached as a change, in the proposed bill. That's why I said it wouldn't work.

Now, there is another source sometimes given for the reasons for the bill—and I'm afraid I have to trespass a little on Mr. Ellingwood's area because I'm going to talk about the misapprehended study, the MSRS study which has been, in my view, misused and misquoted. First, of course, the study was a 1983 study and there had never been a whistleblower case won when the study was issued. There have been none lost since. The coverage of the ones that we have won would change the perception of people about them.

The second thing is that whistleblower reprisal is said by some to have doubled over the last 5 years. The study didn't say that. What the study actually finds is that there is a change from 14 to 19 percent of people who responded who suggest that there was a fear of whitleblowing reprisal. Actually, if you get the raw numbers—and we did, to find out what the study meant—5.3 percent of those who responded in 1980, 461 people out of 8,592 expressed a fear of reprisal, whereas in 1983, 4.1 percent of the respondents—that is 201 out of 4,897 respondents—expressed a fear of reprisal.

What that says is not that the fear of reprisal went up but that it went down, and by 20 percent, the difference between 5 percent and 4 percent being 20 percent. So, what we have got is 201 people out of about 2 million as to whom we're responding on the study. I don't think the study was intended to be interpreted as it was by some who misread it, and I have spent a lot of time trying to figure out how the misapprehensions occurred. I don't think they're misapprehensions that could have been readily perceived without a considerable amount of study. That has been done.

Now, let me say again those are the reasons I don't think the act is necessary and I don't think would work. Let me now say two or three quick things about the law that is proposed.

First, it scuttles the effectiveness of the Office of Special Counsel as a law enforcement agency. That is because: (a) It weakens the subpoena power, and (b), under the lawyer-client privilege we would cease to have a law enforcement relationship with the Offices in Inspectors General.

Second, under the expansion of the Hatch Act which would be caused, the expansion of enforcement, we would be precluded from doing what we now do, that is, writing warning letters. For example, in the previous year or so, we have written about 50 warning letters. If the law as it has now been presented under the Hatch Act amendment, which is in this bill, were to be enforced, I would probably have had to have brought an action against seven medical doctors and a nurse in the Navajo Indian Health Service for allowing their names to appear in two Mondale-Ferraro political announcements. We wouldn't do that.

We would have had to prosecute a New Hampshire sheriff for distributing handbills. We would have had to prosecute a Federal employee of the Department of Education in the District of Columbia for writing some notes on invitations, and some Navy employee in Indiana for stuffing envelopes under the misapprehension that there was no violation in the stuffing of the envelopes. All of those trivial matters would have been required to have been prosecuted under the mandatory prosecutions of the Hatch Act provision which are proposed in the legislation presented.

The worst problem with the whole legislative proposal, however, is the establishment of a lawyer-client relationship. That problem, I understand, ensues from the concern of the committee that the whistleblower is not represented as an individual and that the prosecution doesn't deal with that person except as a witness or a bystander. I understand the concern.

There is another way to address it, I'm sure. Provide counsel for whistleblowers, if you wish, but not the Office of Special Counsel as the source of that because, if you do that, it puts the office in total conflict and it makes it impossible for the lawyers to talk to each other. It makes it impossible for the lawyers to function effectively. It makes it necessary to expand the staff radically to avoid the conflict. I have made some computations on that, and we would wind up with a situation where the lawyers could never withdraw from the case once they got in, even though the efficiency of the service was significantly going to be impaired and the allegations which they were supposed to be representing were trivial. Under the bar discipline rules of the District of Columbia, and a variety of other districts, you're stuck once you're in. I have concluded that would mean a very large staff because we would have both investigative conflicts and laywer conflicts throughout.

Now, I have made a computation as to what that would cost. It's on the board. If you will look just for a moment you will see that at the present we are operating at about $4.6 million on the left-hand side, and the reasons for the colors are to show you what we spend the money on. There is some spent on administration, some spent on planning, a little bit—maybe we should do more planning—there is some spent on investigation, and there is some spent on prosecution. What you don't see there is what we spend getting ready for hearings. That's probably there, too.

Now, on the other side you see what it will grow to under H.R. 4033. There is no way that we could operate in accordance with the statute which is being proposed—and I say "we" meaning the institution because it will be after June 3 if this statute is passed. What would happen is we would have to expand the staff to about 275 to 300 people to do it in accordance with the wish of Congress. That's OK with me. If that's what the Congress wants, the law will be enforced as the Congress says.

But that is a lot of money to spend in a year when Gramm-Rudman is taking the money from a lot of purposes that have been seriously contested in the Congress. It seems to me that before one spends triple the amount on something that is not necessary, one ought to think real carefully as to whether that's what the people of the United States need to get.

I am opposed to it, of course. I view this proposal, with great respect for the members of the committee and the chairwoman, I view the proposal as an expensive and unnecessary appendage to the executive branch, one which would not work, which would have as its major result the destruction of any efficiency that we have been able to build into this function in the last 3 years. Therefore, I oppose it.

Thank you for your patience. Thank you for your consideration of the remarks I have made, and thank you for incorporating the testimony which I have submitted into the record.

Mrs. Schroeder. Thank you very much.

Congressman Horton, do you have any questions you want to ask?

Mr. Horton. I don't have any questions. I was interested in what you had to say and I think the staff will certainly go over this very carefully. I feel that your contributions will be helpful to staff, but I can't agree with you on what you're conclusions are, however, because I do think we need this whistleblower bill. But I will certainly look at the material you furnished and see what impact it has on the bill. I haven't had a chance to review your testimony yet.

Mr. O'Connor. Thank you, Mr. Horton.

If I may, with all due respect, if Congress passes this act, don't pass it with $5 million as a budget; pass it with about $20 million as a budget. Then you might have a chance of enforcing it. It won't work at $5 million. At $20 million it would do some things differently and provide a legal services corporation, but at $5 million——

Mr. HORTON. Is that figure in here?

Mr. O'CONNOR. Yes, sir, 18-point something I think is what I said.

Mrs. SCHROEDER. First of all I want to thank you. I think some of your comments about the Hatch Act and so forth we appreciate and can use. That will be very helpful. I am glad that you recognize we only authorized $5 million in the bill and not 18.

You know, coming from the Judiciary Committee, I am amazed at how you interpret what private practice attorneys do. My understanding is private practice attorneys can withdraw from cases when they learn they've been deceived by their clients. I don't understand why that wouldn't apply to Special Counsel. Your figures are based on the fact that you think we have to push everything to the max, that you can never get rid of anyone.

Mr. O'CONNOR. Almost everything. You see——

Mrs. SCHROEDER. That's not an accurate portrayal of the private sector.

Mr. O'CONNOR. I'm afraid that it is, madam. I practiced in it myself and I think I know.

Mrs. SCHROEDER. You mean if people came in you couldn't ever tell them no?

Mr. O'CONNOR. I think if you will read the decisions of the bar counsel for the District of Columbia, specifically in the mental health area, and review Elaine Coleman's views, see what you think after you've read that.

Mrs. SCHROEDER. Well, we're not doing mental health.

I also don't understand what you see in the bill that prevents the Special Counsel from settling a complaint after a stay is requested.

Mr. O'CONNOR. If the stay is requested, under the bill litigation must follow if the agency doesn't comply with the corrective action. That leaves no negotiation room.

I think that the bill intends to——

Mrs. SCHROEDER. Only if the agency doesn't do it. There is nothing that prevents an agency from suspending a personnel action before the stay is requested, right?

Mr. O'CONNOR. No, there is never anything to keep an agency from complying with the request of the Special Counsel, and often they do.

Mrs. SCHROEDER. We're asking you to be aggressive.

Mr. O'CONNOR. Well, I think if you check the record, madam, you will find the results of my aggression are carved in pretty good stone around this town.

Mrs. SCHROEDER. Well, we may be disagreeing with the prior testimony we've had for the past year.

You mentioned in there two cases where one lacked credibility and one was a mischief maker.

Mr. O'CONNOR. Yes. Those are two cases where we turned down the proposed representation of the case—not the whistleblower—on the basis in the one case—essentially, the reasons that were found by the finders of fact, that's true. Those cases were discussed in other hearings.

Mrs. SCHROEDER. And you have named them?

Mr. O'CONNOR. I could, if you wish me to do so.

Mrs. SCHROEDER. I think that could be helpful for the record.

Mr. O'Connor. In the *Laubach* case, the hearing examiner found that Mr. Laubach lacked credibility and probity, and in the other case, with Berube, he was found by the hearing officer to be a mischief maker rather than a whistleblower. I think he said a mischief maker rather than a true, blue whistleblower.

Mrs. Schroeder. Didn't Laubach actually win his case?

Mr. O'Connor. Well, I don't read it that way. If you read what the department did, they settled the case; it's a buyout, if you call that a win. What the hearing officer held was that he should not have been fired, that he should have been suspended without pay for 6 months. The agency, instead of doing that, made an arrangement with him, which was a compromise. That's a legitimate thing to do, I think, to save the additional cost of litigation. But that is not what I would call a win. Maybe Mr. Laubach does. I can't define win for him.

Mrs. Schroeder. I am also disturbed by your reference to whistleblowers as "informers."

Mr. O'Connor. Why?

Mrs. Schroeder. Because I think that taints how you view them. When you have President Reagan saying he anticipates there could be 25 billion worth of waste saved if we could really get whistleblowers to come forward I suppose we're asking them to inform, but I guess I'm thinking of it in the legal term where informer is more a "snarl" word than a "purr" word. I assume you're using it in that context.

I also chair the Grace Commission Task Force on the Armed Services Committee and Peter Grace says that Reagan isn't even in the ballpark, that there's much more than 25 billion worth of waste, if we had a scenario where people felt comfortable in coming forward. So if I were a Federal employee and I heard the person protecting me calling me an informer, I'm not sure I would blow the whistle if I had a mortgage to pay.

Mr. O'Connor. Well, I understand what you're saying, madam. I think the word "inform" is one that you may interpret in a pejorative fashion. I don't. An informer is what a person is who tells things that they know for the purpose of changing something. These people who we're dealing with as whistleblowers are often doing exactly that, and if they go the right way—that is, as I have said again and again and again—if they'll go the quiet route, if they'll go to the inspector general, if they'll go to the DOD hot line or the GAO hot line, or the covert side of my office, as the 90 people on the chart I showed you a moment ago did, there isn't any possibility of reprisal because their participation in the corrective process will not be discovered.

Those who are overt disclosers of information may or may not disclose something that will save a vast amount of money. But if you look at the ones we have closed, the 220 items that are closed there and outlined for you in the text of the prepared statement, you will see that most of what they're disclosing is anxiety with management's systems, not fraud, waste, and abuse.

Mrs. Schroeder. Have you told the President this?

Mr. O'Connor. Well, I assume he reads the reports that we send. If he wants to read them, he certainly can.

Mrs. **SCHROEDER**. Have you told Peter Grace this? I mean, I'm amazed that we——

Mr. O'**CONNOR**. I have never spoken to Peter Grace in my life, madam.

Mrs. **SCHROEDER**. Or Mr. Packard? We have these private sector groups that are going through different agencies talking to people and they come away with the impression that there is all sorts of waste, fraud, and abuse but the people are afraid to convey it.

Mr. O'**CONNOR**. Oh, they're talking about apples and oranges, maybe. You're talking about the findings of the Grace Commission. You're quite right, there are significant abuses, if you wish to call misspent money an abuse.

Mrs. **SCHROEDER**. I do.

Mr. O'**CONNOR**. I do, too.

But lots of times it isn't a thing that is correctible by a whistleblower because it is either an act of Congress that requires money to be spent in a certain way where it shouldn't be, or a program that is undertaken with the best of intentions by the executive and goes absolutely sour. The money, if you will, is wasted, but there wasn't a way to prevent that from happening.

Overburdened bureaucracy is certainly a way to do it, where you have too many people to do a simple chore. Expanding the bureaucracy is, I think, a way to do it and we shouldn't do that. Expanding programs that are costly and nonproductive is certainly a waste. But that is not something whistleblowers relate to. We're talking about efficiency of management of the Federal dollar. I think Mr. Grace is relating to that very significantly.

Mrs. **SCHROEDER**. Congressman Dymally came in and I should yield to him. I'm sorry because I have more than used my 5 minutes.

Mr. **DYMALLY**. Madam Chairman, I have no questions. I was very impressed with this comparison of what the administration claims the bill does and what the staff says it does or does not do. I also am impressed by your willingness, Madam Chair, to correct the strong points of the administration's criticism and to make the necessary corrections to comply with their objections and to strengthen the bill, or to change it so that they would not have the kinds of objections they are now raising. So I was very impressed with that and I think it's a very constructive way to analyze the bill.

Mrs. **SCHROEDER**. Thank you.

We may have some more written questions later, but I have one final question for you now. You say that people should go to inspectors general. And yet if you look at this, the largest group of whistleblowers did go there and 95 of the 220 still got reprisals.

Mr. O'**CONNOR**. No, madam, they didn't get reprisals. That's the whole point of that chart. That 220 is people as to whom there weren't reprisals. That's the 220 we closed. That's the whole point to the chart.

Mrs. **SCHROEDER**. That's not the way I read it.

Mr. O'**CONNOR**. 220 out of the 303 allegations are closed. The 220 you are referring to is a chart of people who invoked the cloak of reprisal for whistleblowing without being able to be covered by it.

Mrs. **SCHROEDER**. Well, I'm reading that a little differently. And your contention is still that the whistleblowers you're seeing are not showing the kind of waste that we heard from all the private sector groups, that they are instead showing more anger with management?

Mr. O'CONNOR. We get a pretty broad spectrum of complaints, and there are very legitimate ones. The *Spanton* case is one where there was a significant economic issue involved. Not many are like that. We do, in the category of the 90 I mentioned to you earlier, the 90 that were at about 270 degrees on the chart of 1,884, those 90 often come in with perceptions of very significant amounts. In one case, I think it was about $120 million came in that way, about 1 year ago, and it turned out the guy was right. Interestingly enough, it also turned out that it wasn't anything that had to be done to or for anybody, except to correct what had been mistakenly done, improperly done, perhaps, and there was no reprisal taken against the man.

A lot of these people who are really serious about correcting problems—I would call them the most legitimate of the whistleblower group in many cases—aren't anxious to be known at all. What they are anxious to do is see a situation that's bad made better, fiscally bad or in some other way bad. Those are the ones that come in this route.

Mrs. SCHROEDER. But if you look at the *Spanton* case, he would have been gone. He probably didn't want to be all that public and would have preferred not going that way, but had he not gone that way, he would have been gone. There's no question about that.

Mr. O'CONNOR. I guess I started hearing about Spanton in maybe October or November 1982. We finally got the resolution of that case with the full Board not long ago, June 1985, I believe. It is now pending before the circuit court of appeals for the appropriate circuit. Sooner or later there will be a final decision there and I suppose a petition for cert. It takes a long time from, let's say, drink to swallow. But at the time that Mr. Spanton made his initial disclosures, there wasn't any history of protection being provided. Although the law was there, as you all wrote it, there wasn't any protection that had ever been successfully provided to anybody. It's different now.

We live in a dynamic milieu of changing events and perceptions. What I'm suggesting to you today might not be what I would have said to you in 1982. But in 1986 I see it quite differently than I did then, and that's because of the very effective work that's been done by the staff whom we've been fortunate enough to assemble in the Office of Special Counsel, and due also to the maturation of the inspector general systems and the ways in which inspectors general have matured in their relationships with their agencies and making the agencies respond.

From everyone I see, there must be a thousand disclosures that appear someplace else. The Office of Special Counsel is basically a safety valve. It isn't really the focus of most of the whistleblower disclosures.

Mrs. SCHROEDER. Do you have any more questions, Mr. Horton?

Mr. HORTON. No, Madam Chair.

Mrs. SCHROEDER. Mr. Dymally?

Mr. DYMALLY. No.

Mrs. SCHROEDER. I know we're running out of time.

Thank you very much for being here. I appreciate it.

Mr. O'CONNOR. Thank you very much.

[The prepared statement and graphs submitted by Mr. O'Connor follow. The appendix materials—(A, B, and C)—were retained in the subcommittee files.]

STATEMENT OF
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SUBCOMMITTEE ON CIVIL SERVICE
OF THE
COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES
FEBRUARY 20, 1986

Please let me begin my testimony by expressing my appreciation to the Members of Congress for their continued concern for the enforcement of the law which prohibits reprisal against bona fide whistleblowers. Let me also thank you for focusing attention on the Office of the Special Counsel, which is probably the smallest and most modestly funded independent law enforcement agency in the Executive Branch.

The objective pursued, I am sure, is the improvement of the tools of law enforcement and the protection of those who seek to improve the efficiency of government by making protected disclosures of fraud, waste and abuse. Having said that, however, I must turn to the legislative proposal before the Subcommittee, as to which my testimony was requested. While I must say that I believe that everyone in the Administration has understood and heeds the President's stated commitment to protect bona fide whistleblowers, I must also testify now that, on the basis of my understanding, the proposed legislation is seriously flawed and would not achieve that result. Accordingly, I must oppose it as it is drafted.

The proposed statute would make OSC into an expensive, inefficient and ineffective legal engine which might emit noxious fumes and stir up lots of dust while accomplishing less than now. This is because the substantive legal track OSC would have to traverse under the proposed law would remain as narrow and tortuous as it is now. The extant decisional sign posts and substantive legal boundaries are neither addressed nor changed by this proposed statute.

This is because the statute seems to have been drafted to overcome problems which are misunderstood and based on false premises at times. Those misapprehensions are: (1) that a vast number of federal employees will not disclose government wrongdoing and waste because they fear reprisal, and (2) that the OSC does not take up meritorious cases -- that we reject them arbitrarily.

I will address the second of these misapprehensions first, since some legal explanation is necessary. The criticism of OSC cannot be understood to mean that we are not correctly enforcing the existing law. The GAO, after 18 months of investigation, concluded that we were, in fact, executing the existing laws correctly. Moreover, in virtually each case we turn down, there is an alternate right of appeal available; OSC is virtually never contradicted by these other fact-finders. In fact, in two matters closed by OSC which were celebrated in the media as whistleblower cases, the finders of fact who heard the cases found the testimony of one supposed whistleblower to lack credibility, and found the other to be a "mischief maker." In short, all the evidence points to the fact that when OSC predicts that a case has no merit, that prediction is extremely accurate and proper.

The defect in this bill is, in my opinion, that it proceeds from the error that OSC is improperly closing cases. The error reflects itself in a cumbersome and expensive effort to expand prosecutive action without changing the substantive law. A mere change of the existing law to require a less stringent standard of proof will produce little actual change from the present since the finder of fact will most often still have to believe one side and disbelieve the other, regardless of the standard of proof. The misunderstood problem has misshaped the proposed solution.

The draft statute purports to address the protection of whistleblowers as one means of helping to eliminate fraud, waste and abuse in federal government. The focus of the Reagan Administration on this problem has been sharp and constant. Indeed, the insistence on correction of this problem was seminal to the President's campaign in 1980. The Congressional commitment to solution is admirable and should be applauded; it is, in my view, misdirected in the provisions of the proposed statute.

Each of us addresses issues in a way shaped by relevant experience. If you will indulge me, I would ask the Subcommittee to understand that my professional experience causes me, too, to have a very specific appreciation of the matters here under consideration.

For some 20 of the 28 years I have been a member of the bar, I have served as a federal prosecutor of criminal and civil cases. In 1978 and 1979, I investigated and successfully prosecuted some of those who defrauded the government in the GSA scandals which emerged during that time. In 1980, as a Department of Justice official, I was responsible for coordinating the Inspectors General with Departmental prosecutors and the FBI. In 1981 and 1982, as an Inspector General appointed by President Reagan, my office recovered literally millions of dollars in misspent cash, and in cooperation with the Department of Justice and FBI, secured the conviction of numerous cheats, frauds and swindlers, who bilked the taxpayers in the waning days of CSA. I have served on the President's Council for Integrity and Efficiency in Government since it was established in 1981, and I have served as Special Counsel for nearly 3½ years. That is about twice as long as any prior incumbent. As Special Counsel, I have personally litigated and OSC institutionally has tried and won the first major "whistleblower" cases, which now define the law, which the Congress here seeks to address.

My prosecutorial experience long ago convinced me that without protection, informants are inhibited; and, without informants, law enforcement is very much hampered. However, not all informants are protected "whistleblowers", and not every undesirable thing that happens to an informant is a "reprisal." Some informants are not angels; and some sanctions are well merited, even when directed to a reliable informant.

Because of my professional prosecutorial experience, I must take strong issue with the proposed statute. No doubt the draft statute represents a well-intentioned attempt to solve a problem which the drafters understood only imperfectly. That would not be surprising, for the purpose of these hearings is, I am sure, to find out whether -- and if so, how -- current law should be changed.

I will first briefly define my understanding of the problem the Committee is considering and how the law stands now. Then, I will explain the legal issues which must be carefully addressed if effective substantive change is sought. Finally, I will try to tell you why the premises which apparently support the proposed legislation are flawed, and why the proposal before you will not only not accomplish the objective you seek, but will, if passed as drafted, inherently encumber and expensively obstruct the achievement of the goal assertedly sought.

A. The Problem Addressed

The bill seeks to reduce the cost of government by encouraging those who reasonably believe they have identified fraud, waste and abuse to come forward and present their concerns without fear of reprisal for making their disclosures.

This objective is sought, I am sure, by every member of Congress, irrespective of party affiliation. I certainly seek it; I know that President Reagan does, and he expects the objective to be achieved by all his political appointees and by all career staff. So there is no conflict between the Executive and the Congress, nor any partisan political conflict about the propriety or worthiness of the objective. I am sure that all federal taxpayers also agree. So the problem is, how to do it? That is the question the Congress addressed in 1978 and the GAO studied in 1985. It is worth reviewing in the context of this hearing.

1. The Existing Statutory System

The Civil Service Reform Act of 1978 took a bifurcated approach to the problem. On the one side that statute proposed to define a violation of law -- 5 U.S.C. § 2302(b)(8); provide a disciplinary sanction to be imposed -- 5 U.S.C. § 1207; and establish a prosecutorial function -- OSC -- 5 U.S.C. § 1206. The other aspect of the statute -- the requirement of corrective action -- which is a sort of agency restitution for reprisal -- was proposed to be achieved in a less confrontative manner. That is, the prosecutor was required to write to the agency advising it of his findings, and ask for corrective action. Only if the agency refused, could the prosecutor initiate litigation before MSPB against the agency for its refusal to take corrective action 5 U.S.C. § 1206(c)(1)(A) & (B). With respect to most serious personnel actions, the employee would seek a remedy on his own by appealing to MSPB.

At this point, it may be well to recall two facts about the performance of the Office of the Special Counsel prior to 1982. Until 1982, disciplinary actions were rarely filed and all such actions failed. Until 1982, significant corrective action requested by OSC was generally refused by agencies; and OSC lost all the corrective action cases it litigated.

These recitations do not discredit the initial statutory scheme the Congress conceived in 1978. To learn whether or not the law worked as Congress intended, it is necessary to study the body of interpretive decisional law which has now developed. This precedent provides the measure against which the extant statute must be appraised, for decisional law defines the scope of responsible prosecutorial action.

Unfortunately, until the Reagan Administration, the only decisional law OSC developed was based on cases it lost -- cases in which the tribunal found OSC had failed to present proof to support its contentions. With every case OSC lost, the proof required for successful litigation was more strictly defined. Perhaps a level of proof different from that Congress intended was initially adopted by the MSPB in 1979.

The result of this unsatisfactory development was that agencies, which might initially have perceived OSC as a watchdog to prevent violations, came to view it instead as a collection of keystone cops. Anecdotally, in 1982 when I became Special Counsel, one of the first remarks made to me by a peer outside OSC, referred to the OSC as the "gang that couldn't shoot straight". Until 1982, attorneys from at least one cabinet level agency at that time derided OSC as "the team we love to beat". All that has changed. OSC has won all but two cases of the last 31 non-Hatch Act disciplinary action cases, and has also secured corrective action, when it made any sense to do so, without litigation in each disciplinary case successfully prosecuted. The statutory law, however, has not changed.

The proposed legislation changes the emphasis of the OSC function from disciplinary actions, as the primary law enforcement function under the CSRA, to corrective actions. This change of focus appears to be based upon the perception that OSC does not accomplish effective corrective action where appropriate. This perception is incorrect. OSC has sought corrective action on behalf of the victims of prohibited personnel practices on numerous occasions and every time it has been appropriate. Thus, in each of the disciplinary actions filed during my term corrective action, where appropriate, has resulted. See Appendix 1. This corrective action has been accomplished by various means, but in no case has it required expenditure of OSC resources in litigation. Furthermore, there have been many other occasions where OSC has secured corrective action, again without expensive and time consuming litigation.

I would ask you to note that between January 1979 and October 1982 staff levels were as high as 140 FTE. Further, between January 1979 and October 1982 OSC brought and lost six cases before the MSPB. From October 1982 until now OSC has filed 31 non-Hatch Act cases before MSPB and I won all but two. The 31 cases mentioned above were brought at a time when the work year level was reduced to 86 -- now it is 84. There is a message in those numbers, as well as in the numbers cited in the June, 1985 GAO report.

The message is that, with a small, properly trained, disciplined, and led staff, it is possible to enforce the law as enacted. I submit to you that, in the Administration of President Reagan, OSC has successfully enforced the current law.

As I have previously said before this Committee, as a conservative constitutional lawyer I believe in the separation of powers. I believe the Constitution makes it clear that the laws the Congress passes are the only laws the Executive should enforce. The criticisms of OSC made by some witnesses who appeared before this Subcommittee in June 1985 proceeded, for the most part, upon misapprehensions as to the law. These misapprehensions of the law caused apparent disappointment for some of the witnesses, and produced some rather intemperate assertions against OSC. However, disappointment based upon misapprehension is not a proper predicate for more legislation.

B. The Road Not Taken; An Analysis of Current Precedent and the Foci of Change.

Because the Chairwoman is a trained attorney, as are many Members of Congress, and because we are discussing the substance of law itself, I will deal with the topic -- the problem of protecting bona fide whistleblowers from reprisal -- in a legal frame of reference. Before doing so, however, I want to be certain that I have made it clear that, although the current standards of proof are very exacting, the law enacted in 1978 is enforceable, is being enforced, and works as it was written.

I am in favor of the principle of accountability for one's decisions in government. Those who take personnel actions must be able to account for them to OSC and to the MSPB when they become suspect. As the law currently requires, a violation must be proved by preponderant evidence, that is, evidence which suggests that the proposition is more likely true than not. It will not result in less reprisal or more whistleblowing to change this standard of proof to a lesser one because the same difficult elements will have to be proved. The inescapable human fact is that the officials who take these actions are rarely going to admit that they are taking a reprisal. Therefore, the judge or the Board is forced to decide that one side or the other is not telling the truth with respect to the elements. Changing to a lower standard of proof will not change a finder of fact's innate reluctance to believe that a government official has set up an elaborate fraud in order to punish a whistleblower unless that judge sees very persuasive evidence. What doesn't exist in these cases is that very persuasive evidence.

As a conservative lawyer, I favor a high standard of proof when the issue is the overturning of a presumptively proper government personnel action or the imposition of discipline on an official who is presumed to be acting in accordance with both his oath to execute the law and the specific direction of the President. That high standard is the standard of proof the law now requires. That standard primarily depends on specific legal concepts, and defines the level of prosecutive undertaking by OSC.

The proposed bill does not address those legal concepts and I am not asking the Congress to do so.

Please let me invite your attention to some of these specific legal concepts.

(1) Not all disclosures are protected. This statutory point has been pounded home, by MSPB and Court decision. These authorities make it patent that a disclosure is not protected unless it is reasonably believed to be true by the discloser. The statutory and interpretive decisional law thus now cause the experience, mental state, physical powers of observation and bona fides of the discloser all to be litigated issues, to be proven by a preponderance of evidence in disciplinary cases.

The proposed bill does not address this concept.

(2) Not all who make disclosures are protected. Those who make disclosures are protected from reprisal, under existing decisional law, only if the reprisal can be closely linked to the disclosure -- the legal concept is nexus -- by preponderant evidence -- and, even if this condition is met, the current statute applies only if reprisal motivation can be proved by preponderant evidence to have constituted a significant factor in the decision to take an action; and the action complained of as "reprisal" must be proven by preponderant evidence to be adverse to the discloser. The

requirements -- preponderant evidence of nexus and significant factor and adversity all define the legal mesh through which all proposed whistleblower cases must now be screened by OSC. These stringent legal standards, observed and reported to this Subcommittee by the GAO in June 1985, are clearly articulated by the MSPB in *Harvey*, *Brown*, *Starrett* and *Hoban*. These elements, points which must be proved, define to OSC whether a particular whistleblower case can be won.

The proposed bill does not address this concept.

(3) Not all adverse actions are provable reprisals. No corrective action, or disciplinary action, may be brought if no reprisal is found to have occurred to the whistleblower. Under the law, a reprisal requires an adverse personnel action. However, the statutory definition of personnel action does not include everything hostile to a "whistleblower" given the creativity of the human mind. We have all heard the term "rubber-room." A supervisor who desires to retaliate against a whistleblower can shuffle him off to a basement office, without a telephone or access to a secretary. These are not "personnel actions" as defined in the statute, and thus, even if the supervisor admitted that he exiled the whistleblower to the rubber-room in retaliation

for whistleblowing, he has not violated section 2302(b)(8). The same is true for an agency ordered fitness for duty exam. The proposed legislation does not address this problem.

(4) Some personnel actions are so presumptively legitimate that the burden of overturning them is extraordinary. While government actions generally are presumptively valid, there are some personnel actions that are so discretionary that the presumption of validity cannot be overcome without overwhelming evidence that reprisal or some other prohibited motive was the only reason. A graphic example is the geographic reassignment. These actions can be professionally, economically and domestically disastrous, yet may generally by directed by an agency without sanction because of the difficulty in proving that action was not ordered for the efficiency of the service, but rather in retaliation for whistleblowing. As may be recalled, disastrous reassignments occurred or were ordered -- and undone at OSC request without litigation -- in Kaiser and Spanton. The decisional law favors the presumption of regularity, as in the Savitz "c" stay application (involving a reassignment) which was denied by the MSPB in 1983.

(5) Not all adverse actions against whistleblowers, even if intended as reprisal, must be corrected by an

agency. *Corrective* action may not be required by law even if reprisal was committed and a *disciplinary* sanction finally imposed on the law violator. This is because, since 1979, the well known *Mt. Healthy* test has been followed by the MSPB in determining the propriety of ordering corrective action. Agency action, even if it includes an actionable reprisal (I mean one which OSC can successfully prosecute) taken willfully by a supervisor, will stand as proper under *Mt. Healthy* *if it would have been taken anyway for other proper management reasons*. Please let me emphasize that this is the law as it stands; in such cases *no* corrective action would be ordered, even though reprisal played *some* part in the action.

If application of the *Mt. Healthy* standard for evaluating the propriety of corrective action is *not* in accord with the view of the legislature, there has been ample decisional and testimonial notice to the Congress that it *is* the view of the Courts and the MSPB. As a conservative lawyer, I do not here seek new legislation. In prior testimony, I have said that for corrective action purposes, the *Mt. Healthy* standard is acceptable to me because of the presumption of regularity attaching to federal executive actions.

In summary, let me say that any lawyer who carefully studied the applicable statutes as interpreted by the Courts and the MSPB would have to decide, consciously, whether or not to address these five points. Together, these standards form the fulcrum upon which OSC must now balance the prosecutive decision of whether or not the law permits action in "whistleblower cases." The fulcrum would remain the same, even if the proposed statute were enacted as written, since none of the five points was addressed.

Thus, instead of proposing substantive statutory development, the draft statute, proceeding upon apparent misapprehensions, proposes unwarranted innovations which seem to me to be a prescription for an expensive disaster. With your indulgence, I will now tell you why I believe this is so.

C. Misapprehension of the Problem

1. The Deceptive Statistics

a. The Gross Numbers

The press release from this Subcommittee on January 22, 1986, stated that in Fiscal Year 1984, OSC investigated in-depth only 8 of every 100 allegations and that 99 percent of whistleblower reprisal cases were closed without corrective or disciplinary action. On May 15, 1985, the Chairwoman of this Subcommittee said that OSC staff "are not pursuing cases" and, referring to me personally, said, "This guy sounds more like a lap dog than a watch dog." (Hearings Serial 99-19, p. 11). The Chairwoman also said that the prosecutive standards adopted by OSC were designed to protect the Special Counsel rather than to protect whistleblowers. (Hearings Serial 99-19, p. 7) The clear implication is that OSC did something wrong. Apparently, proceeding upon this misconception, it is now proposed that the law must be changed.

The fact omitted from this imputation is that GAO reviewed OSC case closures and found that OSC was correct in its determination in every case examined. Moreover, it bears repeating that of these closed cases, most employees had available to them another route of appeal and that virtually none of them prevailed when they took up their own case. My point is that OSC estimates of case merit are almost 100% correct.

Since, however, the processing of allegations is being questioned once again, I will explain in detail what OSC's caseload looks like; what make up its parts; what happens to cases during processing; and why it happens.

Each and every complaint OSC receives is investigated by OSC until it is ready for trial or until a defect fatal to winning at trial is found. Any decision to close a case is reviewed by at least two levels of supervisors and sometimes more. This is true of cases that are closed in the screening unit as well as those sent to the field investigators for intensive investigation. Borderline cases are investigated as a rule. Our object has been never to overlook a case with merit. There is waste in such a procedure, to be sure; OSC ends up investigating many, many cases that no one really believes will produce the kind of evidence we need to win. The fact is that this is how I ordered it to be done and this is what happens, regardless of the statistics involved.

What are these statistics? During FY 1985 through January 1986, the years for which OSC has the most reliable records, we received 1884 complaints. As shown in Appendix A to this statement, these complaints covered a very broad spectrum of allegations both within and outside OSC's jurisdiction.

Only 66.4 percent (1251) of these were allegations of prohibited personnel practices. Of course, there are 11 enumerated prohibited personnel practices, only one of which is reprisal against whistleblowers. Appendix A shows how the mass of these complaints were processed and what the result was. Some of these allegations were of very serious matters, such as political discrimination. Some were simply not serious, although violative of the law if true. In FY 1985 the Investigation Division completed in-depth investigation of 155 complaints and, at years' end, had another 127 under active investigation. Thus, 282 active investigations resulted from the 1884 complaints. The percentage is, therefore, 14.9 percent of all incoming matters. Moreover, almost all matters which result in in-depth investigation are allegations of prohibited personnel practices so that the percentage of prohibited personnel practice complaints (1251) which are actually investigated in depth for this time period was roughly 22.5 percent. The prosecution results are reported in my annual report and elsewhere, but in each of these investigated cases there resulted a report of investigation, exhibits and a formal legal analysis of the evidence found. These documents were available to GAO and remain available to any authorized oversight body. We are very careful not to pass up a good case.

Looking at the current pending investigative caseload of some 90 active investigations, the investigators themselves do not believe that more than 13 of them will produce evidence of a violation as this is written. Experience at OSC has shown that the investigator predictions are very optimistic and that at least a third of their predictions will not pan out. In the remainder of the cases we are looking hard for reliable evidence but it probably will not be there. That is simply and truly what the history of the OSC caseload demonstrates.

b. The Whistleblower Numbers

Since the focus, including the title, of this bill and its justification is on whistleblowers, we should examine the OSC statistics and files about that body of complainants.

In the period described above, FY 1985 and up to January 1986, OSC received a total of 303 complaints in which reprisal for whistleblowing was either a primary or secondary allegation. Appendix A, p. 3. I will turn shortly to a discussion of those we closed in that time. The current investigative caseload alone --- those complaints under active investigation as this is written --- shows that of the 90 pending active investigation, 33 include a complaint of reprisal for whistleblowing. OSC now expends, therefore, over 36 percent of OSC investigative resources on these complaints alone, involving only one of the 11 prohibited personnel practices.

The next point to be made is that, during the FY 1985 and up to January 1986 period, reprisal for whistleblowing was complained of in 16.1 percent of the total complaints, and in 24.2 percent of the complaints of prohibited personnel practice. Appendix A, p. 1. The appendix shows the distribution of the other complaints by type for comparison. The bottom line is, however, that of the 2 million federal employees, and the countless number of whistleblowers each year (some 14,000 to the DOD hotline alone --- although how many were federal employees is not known), only 303 employees in a 16 month period complained of any reprisal. Clearly, by whatever measure one uses, there is simply not much reprisal even complained about, regardless of the merits of the claim.

c. Analysis of Whistleblower Numbers

OSC recently analyzed all the closed cases from the same 16 month time period to see what characteristics common to reprisal for whistleblowing complaints might emerge. The analysis focused on 220 closed matters of the above 303 allegations.

What we found was that 50 percent of these cases (110) alleged a specific disclosure of information that there was a violation of law or some other problem as the current statute requires. Another 5 percent gave information to an IG or other investigator when requested. Looking at the remainder, one finds that 27.7 percent (61) made claims of unspecific, generalized waste or some other violation; these "disclosures" can best be characterized as disclosures of employee conclusions that there are problems, not of employee-observed evidence --- they didn't have any evidence to disclose. The full remainder of self-described whistleblowers, 17.3 percent, never made any disclosure at all, they simply characterized other actions as whistleblowing!

What one is left with after this analysis is that the population whose conduct deserves most to be protected from reprisal are those 55 percent of those claiming to be whistleblowers who made a specific disclosure of information, not of opinion. Remember also, that this is an analysis of what they claimed, not what subsequent investigation was able to prove.

Next, we looked at the personnel actions complained of by all the 220 as being reprisals for what they described as whistleblowing. There is food for thought here, too. Far and away the greatest number and percentage (36.4 percent) were complaining that they had been disciplined for whistleblowing. What makes this large percentage so interesting is that, under the Civil Service Reform Act and MSPB case law, discipline of an employee is the most stringently regulated and clearly scrutinized of all personnel actions. An elaborate file must be established and the agency must be prepared to prove to the MSPB that the discipline was imposed for the good of the service, whether or not any protected conduct is also alleged by the employee. To me, it is not reasonable to believe that agencies would most often choose the most troublesome means for reprisal. In this statistic alone are the seeds of a suspicion that not all who claim reprisal for whistleblowing can be taken at face value.

The remaining actions are distributed among the range of personnel actions where OSC has any jurisdiction (except where there was not even a personnel action and 6 others where the employee action was voluntary --- not ordered). These remaining personnel actions alleged to be in reprisal provoke only this observation: the next largest body of alleged reprisals are the least documented

--- most easily abused --- personnel actions in existence: reassignments (like that in Spanton). If the Congress wished to address this area of asserted reprisal, the appropriate change in the current law would be to require careful documentation of the reasons for these personnel actions. That is because these actions, not now being "adverse" in the technical sense, require no documentation as to reasons at all. OSC has had many significant victories where these personnel actions were at issue. So I see no basis for recommending any change in the law. The point I am making here, as elsewhere, is that the proposed bill consistently fails to undertake adjustment of known problem areas, and, instead, addresses the straw dog of imputed improper OSC performance.

I come now to a discussion of the reasons OSC closed each of those 220 reprisal for whistleblowing cases. First, we closed 1.8% (4) of them because we found a violation and the agency took corrective action in favor of the affected employees. Where we did not find evidence of a violation the lack of evidence fell often into several of the elements I described earlier: a rotten case is usually rotten on several counts, not just one. In the largest category (26.8%), we could find no evidence to prove that the personnel action was caused by the whistleblowing; that it was a factor at all, much less a "significant factor." In a substantial number of matters (12.3%), we found that the claimed disclosure was not protected by the law and there was no evidence of causation either. In the next largest categories:

- there was not even a personnel action to correct (6.8%);
- disclosure was not found to be a significant factor (6.8%);
- OSC had no jurisdiction over the agency or persons involved (5.9%);
- the complainant would not cooperate with the investigation (5.5%);
- no personnel action and no evidence of causation (4.5%);
- no protected disclosure was made at all (1.8%);
- further OSC action became moot (1.4%).

Before I go on, let me remind you that these are the closed cases; the best allegations of the 303 made during this time period are either among the 4 in which corrective action was obtained or the 83 that are still under investigation or legal review. That said, it is interesting to calculate the percentage of closed cases where there is an indisputably valid reason for closing the case; one not subject to any argument whether or not OSC should have risked losing in a prosecution. Adding all the categories where no protected disclosure was made, there was no personnel action to correct, action was moot, there was no jurisdiction or the complainant refused to cooperate, one discovers a total of 38.2 percent. That is the percentage of allegations that should have never been made. Expressed numerically, of 220 closed reprisal complaints where we found no violation, 74 of them were clearly improvident.

We are left then with quite different percentages even among the closed cases. Of at least facially valid complaints, removing the 74 from the 220, we find the universe of arguably valid cases to be 146. Of this 146, 58 (26.4% of all 220 or 39.7 percent of the 146) were closed on multiple grounds, including a belief that there was no evidence of causation. I think you will agree that a case with multiple defects is the least likely to have any prosecution merit. Subtracting these 58 cases from the 146 leaves a total of 88 cases where there is any room for discussion among trial attorneys about whether or not there was any merit to the case.

OSC decisions to act or not act in cases are carefully documented. The files were and are there for examination. These cases were closed for the very good reason that there was no evidence of a violation, not because of timidity or any desire to protect anything but the integrity of the merit system. It is the integrity of the merit part of the civil service that I am sworn to protect as are all the attorneys and investigators who help me do it. Let me point out, however, that this

analysis of our reasons for closing reprisal for whistleblowing cases is strong evidence that you are not going to produce more whistleblower "wins" in litigation with the changes in this bill. What you are going to produce is a more expensive and cumbersome process to arrive at the same result you have today.

d. What Disclosures are Being Made?

My belief and advice has been that federal employees ought to make disclosures to IG's, OSC or other agencies anonymously or under the protection of confidentiality where possible. I have said so many times. If no one in authority learns who the whistleblower is, there can never be a reprisal. These covert channels have proved effective over these past few years, both in uncovering waste and in preserving confidentiality.

Assuming that the goal of the supporters of this bill is to produce more whistleblowing by making it easier to prove reprisal, one ought carefully to consider what kind of whistleblowing is currently claimed to result in reprisal.

Looking at the claimed whistleblowing among the 220 closed cases discussed above does not create optimism that this bill is going to surface employees who know about truly serious fraud, waste or abuse of government programs. To be kind to the employees involved, most of the claimed disclosures are simply trivial and only technically to be considered as disclosures at all. OSC, the IG's, and the law itself are absolutely worth keeping, in my view, so that those few employees each year who see something genuinely wrong can safely disclose it to the IG's or other proper authority. We must have these systems to keep the government honest and efficient. But any objective review of the supposed problems included in Appendix B to this statement, or the representative remarks included in the MPSB study on whistleblowing, is little more than generalized complaining or unspecific opinion about the inefficiency of government or its programs overall. A review of Appendix B suggests further, as the GAO found, that some who claim to be whistleblowers are in reality either sad and desperate employees seeking an excuse for poor performance or misconduct, or cynical opportunists. 1/ Some whistleblowers, of course, may have suffered reprisal, though neither OSC nor anyone else will ever prove it. But I can assure you that OSC has vigorously done its duty to find evidence of reprisal against bona fide whistleblowers and put things right. Knowing the OSC employees and their dedication, I am confident

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1/ See, e.g. Appendix B, p. 2, item 2; p. 3, item 6; p. 4, items 12, 13; p. 5, item 16; p. 6, item 20; p. 7, item 25; p. 8, items 31, 35; p. 9, items 38, 39; p. 10, items 42, 44; p. 11, items 45, 46, 49; p. 12, items 47, 50, 51; p. 13, item 57; p. 14, items 60, 61; p. 15, item 65; p. 16, item 72; p. 17, item 76; p. 18, items 80, 82; p. 19, items 85, 86, 87, 88; p. 20, items 89, 90, 91, 92; p. 21, item 98 they will continue to do their duty to the law long after I have gone.

2. The Misapprehended Study

Those who support this bill often cite as justification the findings of the Merit Systems Protection Board's 1983 study, Blowing the Whistle in the Federal Government. (Study) As recently as January 22, 1986, in a press release from this Subcommittee, one supporter of this bill was quoted as saying:

> "With fear of reprisal doubling among federal workers over the past five years, it's very apparent our system of protection needs improvement."

This statement is not at all what the Board actually found. 2/

2/ An explanantion for some of the distortion of the Board's findings may lie in the fact that a vociferous, self-described public interest group appears to deserve the honor of the first misuse. In hearings before this Subcommittee on June 18, 1985, a representative of the Government Accountability Project declared in testimony that, "In 1980, 20 percent of whistleblowers did not report problems because of fear of reprisal. In 1983, that was 37 percent." Whistleblower Protection, U.S. House of Representatives, Committee on Post Office and Civil Service, Serial No. 99-19; 105. The error of this statement is manifest: one who chooses not to make a disclosure cannot be a whistleblower.

What the Board actually found, although it is not stated in the text of the report, is that there was no meaningful change in the percentage of federal employees who expressed fear of reprisal compared to the number who claimed to have seen any wrongdoing or waste. In 1980, 13.9% of those who claimed to have seen wrongdoing said they did not report it out of fear of reprisal; in 1983, 19.2% made the same claim. This denotes, if anything, very little actual change in employee fears of reprisal. 3/ This is greatly removed from the exaggerated and dire assertions mentioned above.

Moreover, comparing the number of employees who expressed fear of reprisal to the total number surveyed suggests that fear of reprisal, in fact, dropped among employees as a whole. 4/

The Board did, nevertheless, report that some employees expressed fear of reprisal in 1983: a total 201 in

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3/ These percentages derive from the raw, "unweighted" responses supplied to us by the Board.

4/ These percentages are derived from comparison of the total number of employees who responded in each year with those who expressed fear of reprisal in each year. In 1980, 8592 employees responded compared to 461 who expressed fear or 5.3% of the whole. In 1983, 4897 employees responded compared to 201 who expressed fear of reprisal or 4.1% of the whole. Study, pp. 4, 15, 34. (The MSRS informs us that the actual number responding was 201 and the percentages result from "weighting" the responses.)

all. 5/ It is these 201 fearful employees who are transformed into the alarming and dire assertions that federal employees are increasingly concerned about reprisal. Thus, this infinitesimal sample taken in the context of other survey findings, does not support a worsening trend. Out of some two million federal employees 201 subjective responses is simply not enough evidence to justify the expensive and disruptive legislation proposed.

The Board itself pointed out that any differences in employee willingness to engage in whistleblowing were "negligible" between 1980 and 1983. 6/ The Board's findings demonstrate that regardless of the perception of those 201 employees, the overall percentages of employees who chose to engage or not engage in whistleblowing remained almost exactly the same in both years. 7/

One important difference, however, largely overlooked before today, is that the Board's study found that 44% fewer employees in 1983 claimed to have witnessed any impropriety at all in government in 1983; an apparent testament to improved management in the first

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5/ Study, p. 23

6/ Study, p. 23

7/ Study, p. 24

two years of the Reagan administration. 8/ The assertion of a worsening problem in the face of this evidence seriously distorts the survey data.

A second significant difference between 1980 and 1983, according to the Board's study, was a sharp increase (29%) in the willingness of senior executives to engage in whistleblowing. 9/ In 1980, 39% of senior executives said they had engaged in whistleblowing; by 1983 the percentage had jumped to 68%. 10/ Although, the sample numbers here are also small there is potential importance in this shift in perception since senior executives are those most likely to detect serious corruption or waste and theoretically those most vulnerable to reprisal in the form of reassignments and low performance appraisals. Fear of reprisal, if indeed it exists at all as a factor among these employees, did not affect their decisions to report wrongdoing.

In short, beyond the 201 respondents in the Board's study, no support is found for the belief that fear of reprisal is a growing problem, or even a problem at all. As the Board informs us, the study made no attempt to assess the fear of reprisal among the federal workforce

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8/ Study, pp. 11, 13: a drop from 45% in 1980 to 25% in 1983 is a 44% change.

9/ Study, p. 26

10/ Study, Id.

as a whole and, thus, its findings cannot be interpreted to conclude that there is any increase. The Board, instead, concentrated only on that percentage of the federal population who claimed to have direct knowledge of some wrongdoing and who subsequently chose not to report it. And, the percentage who had had direct knowledge was much smaller in 1983.

In the context of this proposed legislation, it is only valid to conclude from the Board's research that employees claimed to have seen a great deal less wrongdoing in 1983 than in 1980 and, thus, perceptions of fear of reprisal were not interfering with good and efficient government. Furthermore, as the Board itself pointed out, there is a body of evidence that legislation is incapable of overcoming the residual fear of reprisal among employees. 11/

Finally, if the Board's study did detect a growing fear of reprisal for whistleblowing, that observation would only be valid for 1983. In 1984, OSC began to win the first whistleblower reprisal cases. These cases were highly publicized. To the extent that media shapes perception, this alone would have a profound effect in employee perceptions were an appropriate survey taken today.

11/ Study, p. 7, N. 14.

D. The Effect of the Proposed Statute

1. Sectional Analysis

The proposed bill will have significant impacts throughout OSC operations and these effects in turn will require greatly increased staff and attendant costs. Specifically, the proposed bill will reduce OSC subpoena authority, require OSC to pursue fruitless stay and corrective action proceedings and prosecute trivial Hatch Act violations. The proposed bill attempts to reduce the burden of proving reprisal for protected disclosures, but even here does not accomplish an effective change. Finally, the proposed bill completely changes the focus of OSC as a law enforcement agency and creates a legal services office for federal employees who claim an array of wrongs on the job. The ramifications of this radical new approach to federal employment law will be discussed at length below.

a. Proposed Changes in OSC's Subpoena Authority

Current law, 5 U.S.C. § 1205(b)(2), permits the Special Counsel to issue subpoenas requiring the attendance and testimony of witnesses and the production of documents or other evidence. Section 1205(b)(2) imposes no restriction on who might be subject to OSC's subpoena authority. So long as the witness or evidence is located in the United States, its territories or possessions, Puerto Rico or the District of Columbia, OSC may issue subpoenas and have them enforced.

Under the proposed section 1212(b)(2), the Special Counsel's authority to issue subpoenas requiring the attendance of witnesses would be restricted to "any employee, member of the uniform services or contract employee of the Government . . . ." H.R. 4033, at p.15, lines 23-24. Similarly, OSC authority to subpoena documents or other information would be limited to these three classes of individuals.

This change, if enacted, would hamper OSC's investigation of cases involving witnesses who are not civilian, military or contract employees of the government. While most private citizens do cooperate voluntarily in OSC investigations, there are frequent occasions when they do not. The following cases illustrate instances where the lack of subpoena authority would have detrimentally affected the ability of OSC to discharge its statutory responsibilities:

1. In a whistleblower reprisal matter, OSC investigators enforced a subpoena in U.S. District Court to compel the attendance of a former government official who took the reprisal action.

2. In a standard of conduct matter, OSC investigators subpoenaed records of a Las Vegas hotel to prove that respondent had stayed at the hotel as a guest of a labor organization with whom his agency was doing business.

3. In a political discrimination matter, OSC uncovered a pattern of political preference in the hiring practices of an agency's regional office through the testimony of private citizens who were connected directly or indirectly with a state political party. Due to lack of cooperation by some of these witnesses, OSC had to use or threaten to use subpoenas.

4. In a Hatch Act matter, OSC investigators used subpoenas to compel respondents' attendance at interviews and their production of documents.

b. Proposed Changes Regarding Hatch Act Enforcement

Under current law the Special Counsel is required to investigate allegations of Hatch Act violations by federal employees. 5 U.S.C. § 1206(e). If the Special Counsel determines that disciplinary action should be taken for a Hatch Act violation, he is authorized to initiate prosecution before the Board. 5 U.S.C. § 1206(g).

The various Special Counsels over the years have exercised discretion not to prosecute minor or technical violations of the Act and have issued warning letters when investigation uncovers apparent minor or technical violations. This practice is not inconsistent with that followed by the Civil Service Commission in the years immediately prior to passage of the CSRA.

The proposed statute would remove the Special Counsel's discretion in federal Hatch Act cases, and require prosecution of all violations, no matter how minor or technical. Proposed section 1217(b)(1), p.31, lines 18-23. If this had been the law during the last two years OSC would have been required to prosecute, and thereby subject to a mandatory minimum 30-day suspension, the following:

1. seven medical doctors and a nurse in the Navajo Indian Health Service, New Mexico, for allowing their names to appear in two Mondale/Ferraro political advertisements;

2. a New Hampshire Forest Service employee for distributing handbills for a county sheriff;

3. a federal employee of the Department of Education, in the District of Columbia, for writing

notes on invitations to a fundraiser encouraging several persons to support a candidate;

4. a Navy employee in Indiana for stuffing envelopes with campaign literature while under the mistaken belief that there was no violation because the materials were provided by his union representative.

These are only examples of the kind of prosecutions OSC would have to pursue. OSC sent out 50 warning letters in 1985.

c. Proposed Changes in Stay Provisions

Current law permits the Special Counsel in his discretion to request from any member of the Board "a stay of any personnel action for 15 calendar days if the Special Counsel determines there are reasonable grounds to believe that [a] personnel action was taken, or is to be taken, as a result of a prohibited personnel practice." 5 U.S.C. § 1208(a)(1). Any member of the Board "shall" grant the request unless he finds that a stay would not be appropriate. 5 U.S.C. § 1208(a)(2). Under current law, the Special Counsel may request an extension of the stay for 30 days, 5 U.S.C. § 1208(b), or for any period of time. 5 U.S.C. § 1208(c). Only in the case of the latter "c"-stay does the agency have an opportunity to comment on the appropriateness of the stay before the Board issues its stay order. Id.

Under the proposed law, the Special Counsel's decision to request a stay would no longer be discretionary at the point where he determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken. Proposed section 1214(b)(1), p.25, lines 3-10. At such point, the proposed law requires that the Special Counsel "promptly seek a stay." Id. The proposed law would eliminate the "a", "b" and "c" stages of a stay and substitute a 60-day stay. The proposed law is silent on whether the agency will have an opportunity to comment on OSC's request. However, the current standard for Board review is retained: a stay shall be ordered unless it is determined that, under the facts and circumstances involved, a stay would not be appropriate. Proposed section 1205(a)(2), p.10, lines 8-12.

Once a stay has been ordered, the agency would have 60 days in which to reverse or cancel the prohibited personnel practice. If it does not do so, the proposed law requires the Special Counsel to petition the Board for corrective action. Proposed section 1214(b)(2)(A), p.25, lines 11-14.

The proposed law is silent on whether the Special Counsel could informally request a stay or corrective action from the agency once he decides that reasonable grounds exist to believe a violation has occurred. Nor does the law provide for any procedure to request an extension of the stay. However, once a complaint for corrective action is filed, the stay would automatically remain in effect until the Board issues a final decision provided that the corrective action is directed at the action which has been stayed. Proposed section 1205(a)(4)(A), p.10, lines 18-24.

The most serious implications of these changes arise from the attorney-client relationship which OSC will have with the complainant. The implications of this relationship will be discussed at greater length infra. If the client supplies an affidavit to OSC which, if believed, would provide reasonable grounds to find a violation, then OSC is required to seek a stay and subsequent corrective action. If post-stay investigation shows that the affidavit is erroneous or untruthful, there does not appear to be discretion to stop the process. Perhaps OSC could move to dissolve the stay, although there is no provision for such action. However, such a motion would be pregnant with ethical problems for an attorney because the motion would likely prejudice the client's interests.

d. Proposed Changes Governing Corrective Actions

Current law requires the Special Counsel to report his findings to the agency in any case where he determines there are reasonable grounds to believe a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action. 5 U.S.C. § 1206(c)(1)(A). If, after a reasonable period, the agency has not corrected the matter, the Special Counsel "may" request the Board to consider it for corrective action. 5 U.S.C. § 1206(c)(1)(B). Thus, the decision to file a corrective action complaint is, at present, a discretionary one.

The proposed section 1214(b) removes the requirement that the Special Counsel apprise the agency of his findings before commencing litigation. In its place, the bill would substitute the requirement that once the Special Counsel has reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, he must promptly seek a stay. Proposed section 1214(b)(1), p.25, lines 3-10. This mandatory provision would preclude the Special Counsel from obtaining corrective action through informal channels where it might otherwise be economically efficient and strategically advantageous to do so. Moreover, the mandatory requirement of the proposed law leaves no alternative but to become involved in costly and often protracted litigation in every case where the agency declines to take corrective action, even if the Special Counsel does not believe there is a likelihood of prevailing since the agencies may avail themselves of the Mt. Healthy test. Even if the Special Counsel believes that the agency has overwhelming evidence that it would have taken the personnel action in the absence of protected conduct, he must proceed with litigation and expend resources.

e. Proposed Changes Governing OSC Intervention

Current law provides that the Special Counsel may as a matter of right intervene or otherwise participate in any Board proceeding. 5 U.S.C. § 1206(i).

Proposed changes in the law would prohibit the Special Counsel from intervening in either employee appeals or individual rights of action unless the individual consented to such intervention. Proposed section 1212(d)(2), p.17, lines 4-8.

Thus, under the proposed law if an agency requested approval from OSC under 5 U.S.C. § 1206(f), to institute a disciplinary action against a manager for taking reprisal for protected activity, the manager who took the reprisal action could prevent OSC from appearing in support of the agency's position in the manager's appeal of the disciplinary action. For example, in one recent case where OSC approved a request from an agency to remove a manager for sexual discrimination, the manager appealed his removal and OSC intervened to support the agency's position. Under the proposed law the charged manager could have successfully objected to OSC's intervention.

f. Effect of Proposed Change in Standard of Proof for Corrective Action in Whistleblower-Reprisal Cases

The present section 2302(b)(8) of title 5, United States Code, prohibits an official from taking or failing to take a personnel action, as defined by statute, as a reprisal for a disclosure of information which an employee reasonably believes evidences a violation of law, rule or regulation, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The Board has interpreted this to mean that a prima facie case of reprisal for protected disclosures requires the Special Counsel to prove the following elements by preponderant evidence:

(1) that an employee made a protected disclosure;

(2) that an official took or failed to take a personnel action with respect to that employee;

(3) that the official had actual or constructive knowledge of the employee's protected disclosure at the time of his decision;

(4) that the protected disclosure was a significant factor in causing the official's decision to take or not to take the action. In re Frazier, 1 MSPB 163 (1979), aff'd on other grounds, 672 F.2d 150 (D.C. Cir. 1982).

For all disciplinary actions and for corrective actions where "dual motivation" is not present, the Board will find a violation of 5 U.S.C. § 2302(b)(8) and order appropriate action once these elements have been established by preponderant evidence. Special Counsel v. Brown, 28 MSPR 133 (1985); Frazier, supra.

In a corrective action case where "dual motivation" is present, the Board applies the "but for" test of Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), in addition to the above-listed elements. In these cases, the Board will not order corrective action, even if the above elements are established, if the agency proves by preponderant evidence that it would have taken the same action had there been no protected disclosure. Special Counsel v. Department of State, 9 MSPB 14 (1982).

Under the proposed section 1214(b)(3)(B), p.26, lines 3-9, the standard of proof would be lowered from preponderance to substantial evidence for those elements to be proved by the Special Counsel. The Board would be required to order corrective action in a whistleblower-reprisal case if it determines that the Special Counsel has demonstrated by "substantial evidence" that a prohibited personnel practice has occurred, exists, or is to be taken. 12/ However, in dual motivation cases this proposed change would not, on its face, affect the burden of proof which the agency must bear under the Mt. Healthy test. Since it is the agency's burden under Mt. Healthy to prove by preponderant evidence that it would have taken the same action regardless of the employee's protected disclosure, the lowering of the facie case of reprisal would not affect the principal barrier to successful corrective action prosecutions.

12/ Under established Board law, the substantial evidence standard requires only evidence "of such quality and weight that reasonable and fair-minded persons in exercising impartial judgment might reach different conclusions." Parker v. Defense Logistics Agency, 1 MSPB 489, 509 (1980). It is a standard most commonly used in judicial review of administrative decisions. Id. Special Counsel's burden of proof to establish a prima

Only if the proposed law is construed as doing away with the Mt. Healthy defense would the substantial evidence standard have any material effect on corrective action cases brought by this office. However, the proposed law does not, on its face, do this.

g. Effect of Proposed Change That OSC Establish An Attorney-Client Relationship With Complainants

The bill states, as one of its purposes, that the Office of the Special Counsel establish a lawyer-client relationship with employees who claim to have been subjected to prohibited personnel practices. Proposed statute, p.3, lines 5-8.

As mentioned above, under the CSRA, OSC is an investigative and prosecutorial agency which enforces civil service laws. Although established in 1978, OSC's function as the policer of the federal civil service derives substantially from the former Civil Service Commission's law enforcement responsibilities. By changing the office's purpose, the proposed bill, if passed, would fundamentally alter OSC's nature and function.

Section 1212 of the proposed bill states that the Office of the Special Counsel "shall (1) represent and act as legal counsel on behalf of employees alleging prohibited personnel practices before the Merit Systems Protection Board and Federal courts." Proposed statute, p.14, lines 10-14. This section and the implementing sections which follow transpose OSC from a law enforcement agency concerned with the efficiency and integrity of the merit system to a legal service agency whose ethical duty would be to represent, in a competent and zealous manner, aggrieved federal employees in pursuit of their own individual interests.

The establishment of an attorney-client relationship between OSC and any employee alleging a prohibited personnel practice not only substantially changes the role of OSC, but has substantial implications for other sections of the proposed legislation, implicitly invalidating them, or at least making them ineffective.

For example, section 1214(a)(1) of the proposed legislation states that "[t]he Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." Id. at p.24, lines 7-11. This wording is the same as the present section 1206(a)(1). However, once OSC represents the complaining employee in an attorney-client relationship, the meaning of this provision becomes ambiguous. Under the statute as presently enforced, OSC makes the required "reasonable grounds" decision on the basis of information from the complainant, agency sources, and other witnesses. If OSC attorneys determine that the matter could not be proved before the MSPB, under the current law of that forum, OSC will close the matter.

Assuming, however, that the attorney-client relationship begins when the complainant files a complaint alleging a prohibited personnel practice, OSC must determine how far its attorneys must go in pursuing the complaint. Under one view OSC would be required to represent the complainant only as long as there are "reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." Proposed statute, p.24, lines 10-11. Under this view, OSC may be able to terminate the relationship once there is sufficient information or evidence to refute such a belief. However, under the ABA Code of Professional Responsibility (hereinafter referred to as Bar rules), an attorney is required to zealously prosecute the claims of his client; he is required to make all non-frivolous claims that the client wants pursued. Thus, pursuant to ethical standards imposed by the various Bars, OSC attorneys may be required to pursue all matters that are non-frivolous and may withdraw from representation only when it becomes clear that the claim is frivolous. In this regard, it is not frivolous to assert a position without first substantiating all the facts; nor is it frivolous to assert a position even though the lawyer believes that the position will not ultimately prevail. Moreover, it is not frivolous to assert a position knowing that vital evidence can be uncovered only through extensive discovery proceedings.

> Example: Complainant alleges that his removal for unacceptable performance is in fact a reprisal for filing a grievance against his supervisor. Complainant states that a witness has told him that he overheard his supervisor saying that he was going to fire complainant because of the grievance. During an OSC interview, the witness denies having made such a statement to complainant, and denies having overheard the supervisor make such a statement. OSC then confronts the complainant with the witness' denial; complainant persists in his statement that witness made such a statement to him, and must now be lying. The evidence shows that the complainant does in fact have a serious performance problem.

Under present procedures, this matter would probably be closed out by the OSC Complaints Examining Unit: (1) no witnesses and (2) serious documented performance problem undercutting a claim of reprisal.

Under the attorney-client relationship, however, OSC would likely have an obligation to pursue this matter. The OSC attorney would have to believe the client and act according to the client's best interests.

In other words, OSC would have insufficient "reasonable grounds" for pursuing the matter. However, since the complainant has raised a non-frivolous allegation, as his attorney, OSC would be obligated to pursue the matter to litigation.

Section 1214(b)(1), of the proposed legislation further provides that if the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, he shall promptly seek a stay of such prohibited activity. Id. at p.25, lines 3-10. Here too, although the proposed section uses the words "reasonable grounds to believe," the Bar rules would likely require OSC to interpret this in light most favorable to the client. Thus, if the client provides a statement which, without further investigation, sets forth the basic elements of a prohibited personnel practice, and he desires a stay, the OSC attorney would be bound by his ethical obligations to file such a request with the Merit Systems Protection Board.

A similar situation arises with respect to seeking corrective action. Proposed section 1214(b)(2)(A) states that if during the pendency of a stay the agency has not taken action to reverse or cancel the prohibited personnel practice, the Special Counsel "shall" petition the Board for corrective action. Id. at p.25, lines 11-14. The Special Counsel is given no discretion in determining whether corrective action is appropriate or whether it is in the best interests of his client.

Although the proposed legislation is subject to divergent interpretations, it also appears to require the Special Counsel to represent, in an attorney-client relationship, those employees who file section 7701 appeals with the Merit Systems Protection Board and allege, as an affirmative defense to an adverse personnel action, that a prohibited personnel practice was committed. Proposed section 1212(d)(2), p. 17, lines 4-8 (allowing OSC intervention), and proposed section 1212(a)(1), p.14, lines 10-14, (providing that the Special Counsel shall represent the employee before the MSPB). It also appears that OSC would have the same representation obligation in any direct action brought before the Board or the courts by employees or former employees, as well as in any appeal filed by them after a final administrative order of the Board. Proposed section 1205(b)(1), p. 11, lines 8-14 (private right to seek a stay); proposed section 1212(d)(2), p.17, lines 4-8 (OSC intervention in appeals and section 1221 private actions); proposed section 1212(d)(3), p.17, lines 9-13 (appeals to court from final board orders); proposed section 1221(a)(1), p.33, lines 17-19 (individual alleging prohibited personnel practice may bring an action before MSPB for corrective action); proposed section 1221(f)(1), p.35, lines 1-7 (individual may obtain judicial review).

An attorney must act with zeal on behalf of a client, and use whatever lawful and ethical measures are available to vindicate the client's cause. See ABA Model Rules of Professional Conduct, hereinafter Model Rules, and the Code of Professional Responsibility cited to canons, ethical considerations, and disciplinary rules. See Model Rule 1.3; Canon 7 and DR 7-101(A). While an attorney is foreclosed from making a frivolous argument, or taking a frivolous position on behalf of a client, all arguments that can be supported in good faith under existing law or are based on a good faith argument for changing the existing law are proper. In practice few arguments are truly "frivolous."

Another general matter involving the attorney-client relationship created by this proposed legislation concerns the confidentiality of certain government files and information. An attorney must keep the client reasonably informed and must respond promptly to the client's reasonable requests for information about the matter. The attorney should furnish the client with all the information necessary to allow the client to participate intelligently in making decisions about the matter. Comment to Model Rule 1.2. Thus, if OSC had an attorney-client relationship with all those who alleged prohibited personnel practices, OSC may be required to provide to its clients all material received during an investigation or during discovery, including otherwise confidential material or material that would not be available to the employee under the Freedom of Information Act or the Privacy Act. This kind of information is now available to OSC, pursuant to Privacy Act exemption and protected from disclosure because of OSC's status as a law enforcement agency. 5 U.S.C. § 552a(b)(7). As appendix B makes clear, many of the complainants to OSC simply should not have such access to government files.

The attorney-client relationship also poses additional problems for OSC attorneys as government employees. Absent the consent of the client, an attorney has an ethical obligation not to reveal information relating to the representation of his client. Model Rule 1.6; DR 4-101(B). The ethical duty of confidentiality is closely related to the attorney-client privilege, but differs in three important ways. First, the ethical duty is absolute, whereas the attorney-client privilege provides only an exclusionary rule of evidence. Thus, the ethical duty prohibits an attorney from voluntarily revealing information relating to the representation; it applies in every context even where the attorney-client privilege may not apply. See comment to Model Rule 1.6. Furthermore, the ethical duty is comprehensive in scope. While the privilege covers only confidential communications, the ethical duty covers not only confidential communications, but also any other information that the attorney obtains relating to the representation of the client, no matter what the source of that information. Finally, the ethical duty concerns the use as well as the disclosure of information; the privilege concerns only the disclosure of information. An attorney can be disciplined for using a client's information to the disadvantage of the client.

Additionally, the proposed law would have its most problematic impact in the area of conflicts of interests. A lawyer's professional judgment must be exercised solely for the benefit of the client, free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of another client, nor the interests of a third person, or entity such as the government, should be allowed to interfere with the lawyer's loyalty to the client. EC 5-1.

The ABA rules provide that if an impermissible conflict of interest is apparent before the lawyer takes on the client's matter, the lawyer must not take it on. DR 5-101(A) and DR 5-105(A); Model Rule 1.7. If an impermissible conflict becomes apparent after the lawyer has taken on the matter, the lawyer must withdraw. DR 5-105(B) and DR 2-110(B)(2); Model Rules 1.7 and 1.16(a)(1). Yet the bill, as proposed, does not give OSC attorneys these options.

It is difficult to fathom a situation where OSC could begin representation of a client before the MSPB or the courts on allegations of prohibited personnel practices, and then withdraw that representation without prejudicing the client. Such a move to withdraw would signal that OSC has found evidence that refutes the client's allegations, since OSC is required to represent the client if it has reasonable grounds to believe that a prohibited personnel practice has been or is to be committed. Thus, in reality, OSC could never withdraw, and would be forced to prosecute cases in which it had already determined that no prohibited personnel practice had been committed, or could be proved.

Disciplinary Rule 4-101 of the Code of Professional Responsibility prohibits a lawyer from revealing the confidences or secrets of his client, except in certain circumstances, such as where the client consents, or where the disclosure is permitted under the Disciplinary Rules or required by law or court order.

The lawyer-client relationship established by the bill may prohibit the OSC from complying with the provisions of the Freedom of Information Act, unless the Freedom of Information Act is considered to be a law permitting disclosure of client confidences or secrets, or unless the client authorizes disclosure. Violation of the FOIA subjects the withholding official to disciplinary action, and subjects the agency to attorney fees and other litigation costs. Thus, substantial parts of OSC files which are now subject to the FOIA may be required to be withheld under the lawyer-client privilege, and may subject OSC to substantial litigation concerning the precedence of the privilege over the FOIA, or, if material is released by OSC, substantial litigation before the disciplinary board of the appropriate Bar of the attorney or his employee who divulged the confidences.

Further, the proposed bill, in sections 1218 and 1219 (pages 32-33) provides for transmittal of information to Congress and for an annual report of the Office of Special Counsel. A substantial amount of information now transmitted to Congress and included in OSC's annual report may no longer be available to Congress or the public, because the Special Counsel would be prohibited by the Code of Professional Responsibility from releasing any client confidence or secret.

2. Cost Implications

My testimony so far has concentrated on the new requirements placed upon the Office of the Special Counsel by the proposed legislation. As you know, additional requirements always have attendant additional costs. The Office of the Special Counsel is currently authorized to operate in Fiscal Year 1986 with $4,594,000. If this legislation is passed, in order to carry out the provisions, the Office of the Special Counsel estimates that its budget will have to be increased to $18,000,000. I believe this estimate is conservative.

The approximately $13,400,000 increase is primarily concentrated in the Prosecution and Investigation activity areas and is mainly precipitated by the requirements of the attorney/client relationship which is mandated by the proposed legislation. This alone accounts for $4.7 million in the investigation area through a projected manpower increase of 80 positions and further need for funds to cover travel of $1.7 million. Another $0.4

million will be required to pay for transcripts and increased personnel benefits. The remaining $2.6 million is accounted for in direct personnel costs.

With respect to litigation activities, the attorney/client relationship would require an estimated 83 attorneys and support staff. Approximately $5.0 million will be needed to cover these personnel costs, additional travel, transcripts and so forth.

Further, projected requirements for legal staff of four positions and $0.2 million will be necessitated by the requirement to prosecute all alleged federal Hatch Act violations. It is also expected that a staff increase of seven persons and about $280,000 will be needed to meet the requirements of regulatory review.

The balance of the $18.0 million is comprised of overhead and supervision in the amount of $3.2 million. However, $1.4 million of this overhead is a one-time expense to cover the establishment of four new field offices, moving expenses and equipment purchases.

The staffing of the Office of the Special Counsel will have to increase from 84 FTE positions to an estimated 270 FTE positions. In order to be effective and to respond adequately to the added responsibilities, many of which are mandated by the proposed statute, funding and staffing levels for this operation must be increased to this extent. This is a conservative estimate; to provide for less would virtually assure conflict of interest problems which would halt the functions of the office long before the proposed sunset date.

E. Conclusion

The draft bill would destroy the present structure of agency employee relationships; would cripple and pervert the law enforcement function of OSC; would not reach the legal concepts which would require change if the stated objectives of the bill were to be pursued; and has an inevitable annual direct cost increase for OSC alone of at least triple the funds now appropriated.

The bill is flawed conceptually, as well, from inception, for it proceeds upon the false premise that proper law enforcement systems now in effect do not work to protect bona fide whistleblowers. The fact is that, now, the statutory protection works. I oppose the bill.

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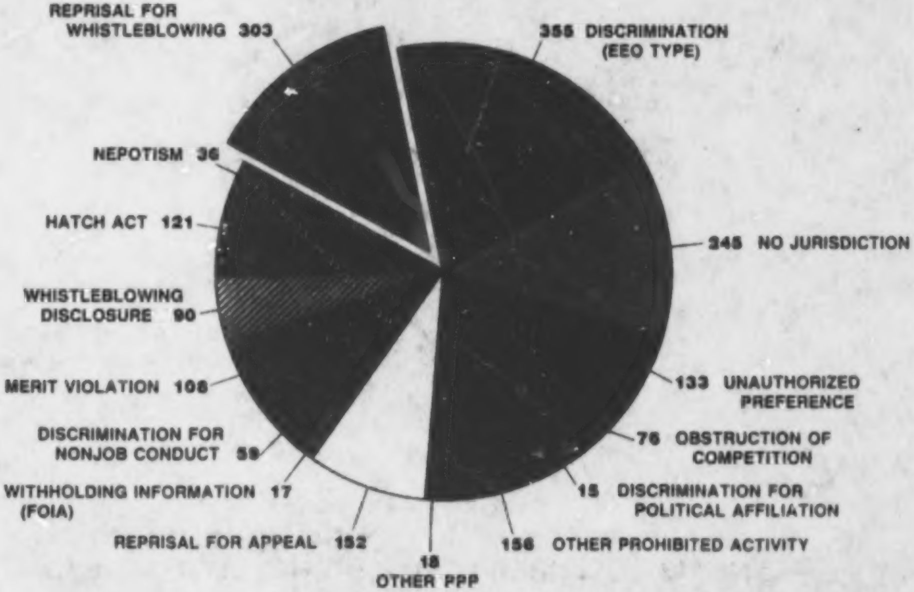
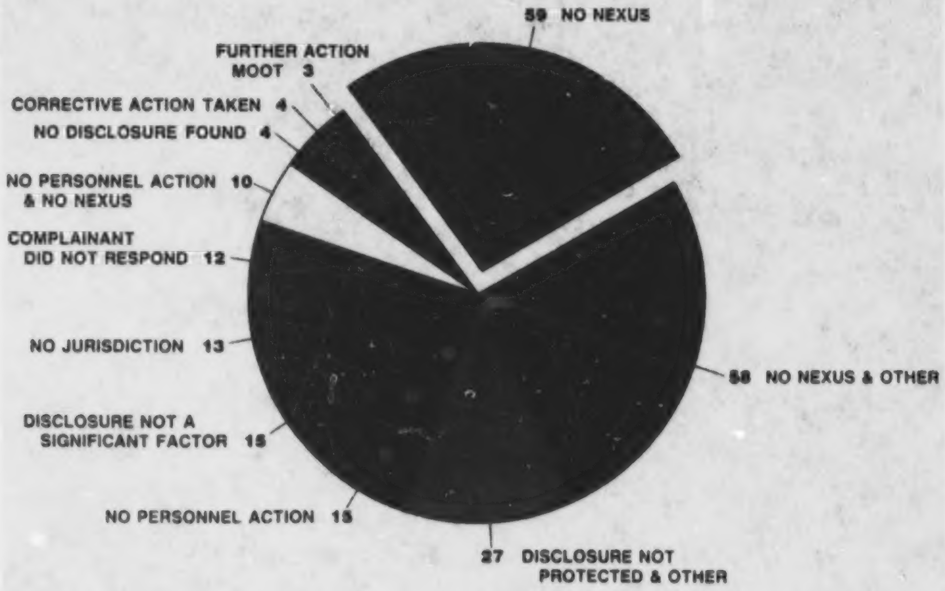
ANALYSIS OF INTAKE (10/84 – 1/86)

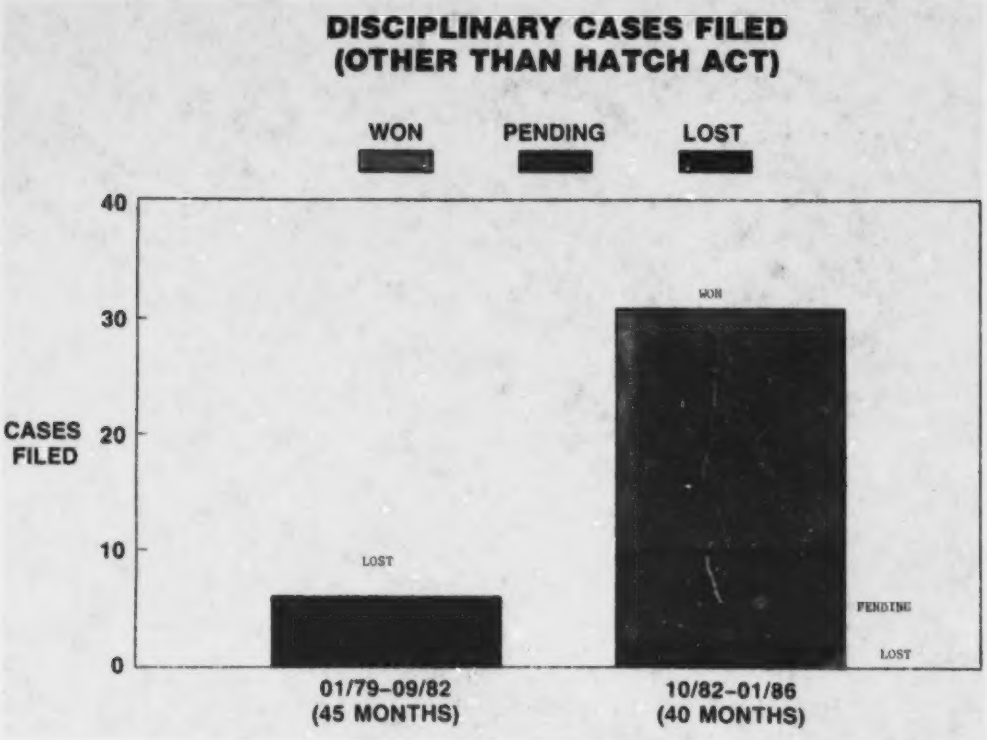
1884 MATTERS



CLASSIFICATION OF 220 CLOSED COMPLAINTS ALLEGING REPRISAL FOR WHISTLEBLOWING

(10/84 – 1/86)





DISCIPLINARY CASES FILED (OTHER THAN HATCH ACT)

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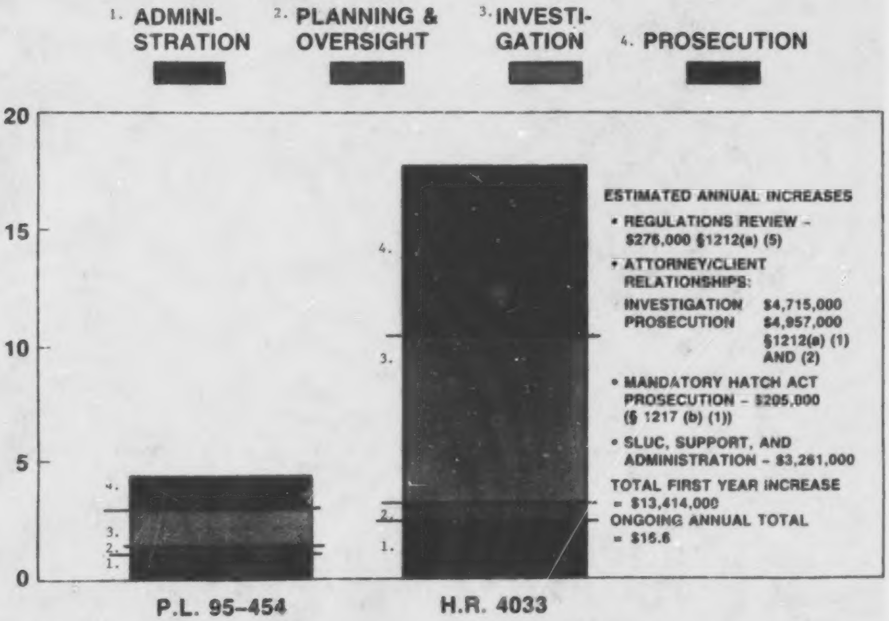
COST OF PROPOSED LEGISLATION (IN $ MILLIONS)



ESTIMATED ANNUAL INCREASES

- REGULATIONS REVIEW – $276,000 §1212(a) (5)
- ATTORNEY/CLIENT RELATIONSHIPS:

INVESTIGATION	$4,715,000
PROSECUTION	$4,957,000 §1212(a) (1) AND (2)

- MANDATORY HATCH ACT PROSECUTION – $205,000 (§ 1217 (b) (1))
- SLUC, SUPPORT, AND ADMINISTRATION – $3,261,000

TOTAL FIRST YEAR INCREASE = $13,414,000

ONGOING ANNUAL TOTAL = $15.6

Mrs. **Schroeder**. The next witness that we have this afternoon is Mr. Stuart Schiffer, Deputy Assistant Attorney General for the Commercial Litigation Branch of the Department of Justice. We welcome you. Again, we will put your entire testimony into the record. We would like you to summarize what you want to say about the legislation in 7 minutes so we can proceed to questions.

STATEMENT OF STUART E. SCHIFFER, DEPUTY ASSISTANT ATTORNEY GENERAL, COMMERCIAL LITIGATION BRANCH, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE; ACCOMPANIED BY ROBERT REUTERSHAN, SUPERVISORY ATTORNEY, CIVIL DIVISION

Mr. **Schiffer**. I shall, indeed.

Good afternoon, Madam Chairwoman, members of the subcommittee. Permit me to introduce Robert Reutershan who is with me this afternoon. Mr. Reutershan is a supervisory attorney in the Civil Division who practices extensively in the Federal personnel area.

At the risk of restating the obvious, I think that we can best express our fundamental concerns with this legislation by revisiting for a moment the fundamental goals of the 1978 Civil Service Reform Act. Indeed, we appreciate that these are also the goals of this subcommittee and the sponsors of this legislation.

The fundamental purpose of the act, at least as I understand it, was to bring balance to goals that can and usually do exist in harmony with each other, but frequently come into conflict in the Federal personnel realm; namely, on the one hand, the strengthening and protection of legitimate rights of Federal employees, and on the other hand—and again without suggesting there need be conflict in these areas—the promotion of incentives and opportunities for managers to improve the efficiency of Federal service.

We believe the drafters and enactors of the 1978 statute wrote well, and I suggest if we do have a disagreement it's probably over that point, where the balance should be and how things have been working.

In our view, the bill that is pending before the subcommittee would, again with all due respect—"subvert" is probably too strong a word, but I guess is the word that comes to mind—would subvert some of these very goals and, in fact, would take us back to some of the preexisting mechanisms the 1978 act was designed to change and to reform. We would see additional layering by way of review in district courts, as well as courts of appeal, where the 1978 act eliminated some of that layering and centralized, for example, appellate jurisdiction in the U.S. Court of Appeals for the Federal Circuit. We would see a glut of cases, I submit. Mr. O'Connor spoke about his office, but I think it goes well beyond that. We're talking about placing enormous strains on the Federal courts, on the Merit Systems Protection Board—speaking selfishly, on Federal Government lawyers, who would be required to defend these cases.

If I believed that—and I very much share the chairwoman's concern about waste and abuse in Federal Government and the fact that large dollars are lost through waste and abuse I would concede that if we believed this bill would lead to substantial dollar savings, for example, that, indeed, these costs might be minimal. If we were going to be saving billions, then I suppose the expenditure of a few million could be justified.

But I think we must also address the very substantial concerns that I hear expressed every day about inefficiency in Government, the stereotype of Federal managers—something I hear all the time from my friends who are not in Government service—the stereotype of Federal managers who are afraid to make decisions, the notion that Federal employees can't be fired when they're not performing their jobs. All of these are false, but I think several aspects of this bill would not only reinforce some of those stereotypes but my concern is it would make them come true.

I'm concerned about the whistleblower or other Federal employees who have meritorious cases. The expansion of judicial remedies, of administrative remedies, if it would only mean that some people who shouldn't have or need not necessarily have a day in court would have a day in court, wouldn't cause me to be as worried about giving additional rights to vast categories of people. But I have heard Federal judges speak about their concerns about frivolous cases and they emphasize throughout that their real concern is for the meritorious litigant and the fact that as you increase the number of people who come to Federal court with whatever complaint, their time is taken from meritorious cases. That's a concern that we share.

I am being somewhat broad and scattershot in my comments. Perhaps I can best proceed by responding to questions.

[The statement of Stuart E. Schiffer follows:]

STUART E. SCHIFFER
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

I am pleased to appear before you today to discuss the Department's position with regard to H.R. 4033, the Whistleblower Protection Act of 1986 ("the Bill"). The Bill would make sweeping changes to the system for protecting the rights of federal employees enacted by the Civil Service Reform Act of 1978 ("CSRA"). It would authorize the creation of an independent Special Counsel who would not be subject to the control of the President, perpetuating an authorization of highly questionable constitutional validity. It also would expand greatly the role of the Special Counsel by requiring him to represent individual federal employees, by authorizing him to appeal decisions of the Merit Systems Protection Board to United States district courts, and by granting him authority to represent himself in all federal courts other than the Supreme Court. It also is questionable whether the vesting of this authority in the Special Counsel is constitutional.

The Bill also would expand the jurisdiction of the Merit Systems Protection Board ("MSPB") by increasing the duration of stays of personnel actions that the board may issue; by granting the board jurisdiction to entertain appeals brought by employees and applicants for employment involving all types of personnel actions that, it is alleged, are or are not taken as a result of prohibited personnel practices; and by granting to the MSPB the unprecedented authority to recommend that disciplinary actions be taken against members of the military services and contractor services in the private sector. The proposed legislation also would provide that the existence of the prohibited personnel practice of taking reprisal against a whistleblower could be established by "substantial evidence" and would grant employees who are not successful before the MSPB with their claims that they were subject to prohibited personnel practices the right to seek review of the board's decisions in the United States district courts.

Thus, contrary to the Bill's title, it is does much more than address the issue of whistleblower protection; in fact, it proposes a wholesale revision of the relationship between the MSPB and the Special Counsel and departs dramatically from the scheme enacted by the CSRA for the enforcement of the merit system principles established by the CSRA. It is the Department's view that enactment of the Bill would cause wholesale disruption of federal personnel management, would result in the clogging of the calendar of the MSPB to the extent that the board would not be able to function in the manner contemplated when it was created by the CSRA, and would result in the district courts becoming the ultimate personnel office for the Federal Government. Accordingly, the Department of Justice strongly opposes the enactment of the Bill.

I

The role of the Special Counsel envisioned by the Bill clearly is that of an officer of the Executive Branch. The Special Counsel would function as both a prosecutor of those who violate the principles of the merit system and a representative of those who believe that they have been harmed by the commission of prohibited personnel practices. In both of those functions, the Special Counsel would be acting to insure that the laws are faithfully executed--clearly a function of the Executive Branch. U.S. Const. Art. II, § 3, cl. 4. However, neither the present Special Counsel nor the Special Counsel as conceived by the Bill is or would be subject to the control of the President.

The Special Counsel now is appointed by the President, by and with the advice and consent of the Senate, for a term of five years, but may be removed from office by the President "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1204 (1982). The Bill similarly provides that the Special Counsel would be appointed by the President with the advice and consent of the Senate and that he would serve for a five-year term subject to removal by the President for the same reasons now provided in section 1204. Proposed 5 U.S.C. § 1211(b). This Department consistently has taken the position that the limitation upon the President's authority to remove the Special Counsel for reasons of his own choosing raises serious constitutional questions. In a letter to Chairman Ribicoff of the Senate Committee on Governmental Affairs dated June 14, 1978, Assistant Attorney General Harmon stated at page 6:

> [T]he primary duties of the Special Counsel [would be] (1) to receive and investigate allegations of prohibited personnel practices,

> and (2) to initiate and prosecute cases involving prohibited personnel practices before the Board.
>
> The functions of the Special Counsel would be predominantly executive in character. Even though the Special Counsel will present his cases only to the Board, his role in investigating and prosecuting prohibited practices is much the same as that of a United States Attorney or other federal prosecutor. These duties, no less than a prosecutor's, are directed at the enforcement of the laws, and this is a function that the Constitution entrusts to the Executive branch. See Buckley v. Valeo, 424 U.S. 1, 138 (1976); Springer v. Phillipine Islands, 277 U.S. 189, 202 (1928).
>
> If the Special Counsel is appointed by the President, since he will be performing largely executive functions, we believe that Congress may impose no restrictions on the President's power to remove him.

The same rationale applies to the Bill now under consideration; its purported limitation upon the President's authority to remove the Special Counsel is not valid. Myers v. United States, 272 U.S. 52, 164-70 (1926).

Moreover, even if the Bill were altered to provide for presidential control over the Special Counsel, we would not be in favor of extending his authority in the manner proposed by the Bill. Under existing law, the Special Counsel's litigating authority is confined to cases before the MSPB. The Bill would expand this authority by authorizing the Special Counsel to designate attorneys to appear upon his behalf in all courts except the Supreme Court and to seek review in the United States district courts of decisions of the MSPB in any case to which he was a party. Proposed 5 U.S.C. § 1212(c), (d)(3).

This Administration, as a policy matter, generally has opposed any legislative proposal which would erode further the Attorney General's litigating authority under 28 U.S.C. §§ 516, 519. This opposition, shared by previous Administrations, is grounded upon the need for centralized control of all Government litigation. Such control furthers a number of policy goals, including the presentation of uniform positions upon important legal issues, the objective litigation of cases by attorneys unaffected by the concerns of a single agency that may be inimical to the concerns of the Government as a whole, and the facilitation of presidential supervision over Executive Branch policies implicated in Government litigation. This policy benefits not only the Government but also the courts and opposing litigants who, in the absence of the policy, might be subjected to uncoordinated positions on the part of the Government.

There is an additional reason why the Special Counsel should not be granted general litigating authority. An agency's authority to litigate independently of the Attorney General in a particular circumstance generally depends upon whether such authority is vested by statute in the agency. However, when the agency asserting that authority is an Executive Branch agency, constitutional issues arise if Congress also has vested litigating authority over the same case either in the Attorney General or in another Executive Branch officer. At stake are issues involving the President's authority to exercise supervisory control over his subordinates so that he may discharge properly his constitutional obligation to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3, cl. 4, and Congress's potential violation of the constitutional principle of the separation of powers by its interference with the President's exercise of that authority. See Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, supra.

In view of the broad grant of litigating authority proposed by the Bill, it is clear that the Special Counsel would be authorized to initiate, or otherwise to participate in, litigation in which Executive Branch agencies would be defending themselves against allegations that they committed prohibited personnel practices. Of course, the Department of Justice would be representing the Executive Branch agencies in those cases in which they were involved. In such circumstances, the litigating authority granted to the Special Counsel would place the President in the untenable position of speaking with two conflicting voices by both prosecuting and defending the same action. That is not a constitutionally permissible result, as it would require the President to abdicate his constitutional obligation to execute the laws faithfully and would fall short of "that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone." Myers v. United States, 272 U.S. at 125.

Permitting the Special Counsel to litigate against Executive Branch agencies also would offend Article III of the Constitution because it would require the federal courts to render advisory opinions. It has long been settled that our courts may not give such opinions. See Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n. (a) (1792). For the federal courts to resolve disputes between two agencies, both of which are headed by officers removable at will by the President, would provide the Executive Branch with the type of advisory opinion long recognized as being impermissible.

Proposed 5 U.S.C. § 1218 also is constitutionally infirm. That section would allow the Special Counsel or his designate to communicate with the Congress independent of "other administrative authority," presumably the President and the Office of Management and Budget. Such a provision, if enacted, would permit the Legislative Branch to intrude unconstitutionally upon the President's authority over subordinate officials in the performance of their Executive functions. It would severely impair the President's ability to perform his constitutional obligation to "recommend to [Congress the] consideration of such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3.

As the President's subordinate, the Special Counsel is obligated to make his recommendations to the President so that the President may judge which are "necessary and expedient." For Congress to require the Special Counsel to report directly to it without such review would constitute a grave interference with the President's performance of his constitutional obligation as well as irreparably damage, if not destroy, the normal exchange of views between agency heads and the President. The provision, if enacted, also would create in the Special Counsel divided, and possibly inconsistent, loyalties between the Executive and Legislative Branches, in violation of the doctrine of the separation of powers.

II

The Department has several objections to the portion of the Bill that reestablishes the authority of the MSPB. Under existing law, the Special Counsel may seek from the MSPB one ex parte 15-day stay and a subsequent ex parte 30-day stay of a personnel action if he "determines that there are reasonable grounds to believe that [a] personnel action was taken, or is to be taken, as a result of a prohibited personnel action." 5 U.S.C. § 1208(a)(1). If a member of the MSPB is persuaded that the Special Counsel has "reasonable grounds" to believe that the personnel action was taken, or is to be taken, as the result of a prohibited personnel practice, the member must stay the personnel action. 5 U.S.C. § 1208(a)(2), (b). However, before the board may extend a stay beyond 45 days, it must provide the agency involved an opportunity to submit oral and written objections to the extension of the stay.

The Bill not only would extend the length of initial stays sought by the Special Counsel to 60 days, but also would grant individuals the right to seek stays of personnel actions for 120 days. Proposed 5 U.S.C. § 1205(b). Moreover, the Bill provides that, if a stay is in effect at the time the Special Counsel files a petition for a corrective action or when an individual files an appeal with the board pursuant to proposed section 1221 of title 5, United States Code, or current section 7701 of title 5, United States Code, the stay shall remain in effect automatically until the Special Counsel's action or the individual's appeal is finally adjudicated by the board. Proposed 5 U.S.C. § 1205(a)(4)(A), (B).

The Department is aware of no reason for altering the current provisions of law providing for 15- and 30-day stays and the possibility of indefinite stays, in the discretion of the board. The existing time limitations upon "automatic" stays encourage the Special Counsel to conduct his investigations quickly and do not impose too significant a burden upon federal agencies. The same cannot be said for the proposed stay provisions.

Further, there is no good reason not to provide the MSPB with authority to dissolve stays once they are entered. Simply because there was good cause for the issuance of a stay when the board initially became aware of a situation does not mean that circumstances necessarily will not change or that the board never will be provided evidence during the course of proceedings before it that indicates that a stay no longer is warranted. The board, like other adjudicatory and quasi-adjudicatory bodies

with authority to issue stays or injunctive relief, should be granted the authority to consider such things as the public interest not only in determining whether to impose a stay, but also in deciding whether a stay, once granted, should be dissolved.

The Department of Justice strongly objects to the failure of the Bill to grant federal agencies the right to present their views as to the appropriateness of a stay to the MSPB. Without the opportunity for consideration of the views of federal agencies, it is much more likely that board members will err in assessing the reasonableness of stay requests than if they are advised of the positions of the agencies with regard to the appropriateness of staying personnel actions. Of course, denying agencies the right to present their views to the MSPB concerning the appropriateness of the issuance of stays is fundamentally unfair.

The expansion of the board's jurisdiction over corrective actions to include the authority to recommend the taking of disciplinary actions against members of the military services that would be accomplished by the enactment of proposed 5 U.S.C. § 1215(b) would be a totally unprecedented intrusion of the civilian portion of the Government into the operation and functioning of the military. We are unaware of any circumstances under which a civilian authority outside of the military departments is authorized to recommend the taking of any action impacting upon the tenure of uniformed military personnel. Furthermore, "[i]t is settled that responsibility for determining who is fit or unfit to serve in the armed services is not a judicial province . . . ." Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1984); accord Orloff v. Willoughby, 345 U.S. 83 (1955). If Article III courts may not interfere in such matters, it makes little or no sense to allow the MSPB to do so. To require members of the uniformed services to defend their actions before the MSPB would be to make a fundamental alteration in the longstanding authority of the military to determine when, and under what circumstances, to discipline its members for their transgressions. We are aware of no circumstances which would call for the abandonment of this historical separation of the military and civilian sectors of the Government.

Proposed section 1215(h) would grant the MSPB jurisdiction to try disciplinary actions brought by the Special Counsel against presidential appointees who have been confirmed by the Senate and who are charged with the commission of a prohibited personnel practice. If, after a Special Counsel prosecution of such an individual, the MSPB were to find that the presidential appointee committed a prohibited personnel practice, the MSPB "shall recommend to the appointing authority of such official what type of disciplinary action should be imposed." This is a drastic and totally unwarranted change from the CSRA's reasonable approach to the resolution of charges of the commission of a prohibited personnel practice by the highest level officials of our Government.

Under the CSRA, 5 U.S.C. § 1206(g)(2), when the Special Counsel has reason to believe that a presidential appointee has committed a prohibited personnel practice, he is required to report that fact to the President, who then determines whether to take disciplinary action against his appointee. Thus, under the CSRA, cabinet and sub-cabinet level officials are not required to cease functioning in their positions to prepare for the defense of and to appear before the MSPB to defend against charges brought against them by the Special Counsel. The disruption that would be caused to an agency if one of its presidential appointees were required to defend himself in a quasi-judicial proceeding before the MSPB is readily apparent. There simply is no good reason why the President should be divested of his authority to determine if a prohibited personnel practice was committed by one of his appointees. He certainly has the resources to do so without requiring our most important federal officials to be the subject of disruptive adversary proceedings.

Proposed 5 U.S.C. §§ 1214(b)(3)(B)(i), 1221(d)(1) would provide that, in a proceeding brought before the board by either the Special Counsel or an individual seeking corrective action for alleged reprisal for whistleblowing, the board would be required to find in the Special Counsel's or the individual's favor and to order the agency involved to take corrective action (such as reinstating an employee who had been removed or cancelling a transfer) if it were established before the board by only "substantial evidence" that the agency took the personnel action at issue in reprisal for whistleblowing. The enactment of this provision obviously would ease the burden upon the Special Counsel and individuals who consider themselves to be whistleblowers to "prove" their allegations of reprisal before the MSPB. However, allowing them to do so under the most relaxed standard of proof known to the law could have a devaststing and completely unfair impact upon agency managers who, it is determined by substantial evidence, took reprisal actions; they could well be subjected to carrying the stigma of having done so when the preponderance of the evidence before the board indicated that they were innocent of the charges against them. Accordingly, we strongly oppose the enactment of that standard of proof.

While the Department fully supports the protections made available to whistleblowers by the CSRA, we believe it would be wholly inappropriate to stack the deck in favor of purported whistleblowers to the complete detriment of agency managers. If the Special Counsel or an individual whistleblower is unable to establish reprisal against a whistleblower by a preponderance of the evidence before the MSPB, a standard that does not exclude the possibility of finding that reprisal occurred even where the trier of fact has some doubt about the matter, notions of fair play ought to preclude labelling the agency manager a repriser.

Proposed section 1222 of title 5, United States Code, would give the MSPB the unparalleled authority to award punitive damages against federal agencies if they failed to comply with an order of the board. The Bill contains no limit upon the amount of punitive damages that the board could award and provides no guidance to the board as to what criteria should be employed in determining either whether to award such damages or what the amount of an award of those damages should be. We note that the Bill does not provide an appropriation for the payment of awards of punitive damages and we are unaware of any agency which now has an appropriation that would allow it to pay such an award. Moreover, it is not in the public interest to require the expenditure of public funds for the payment of punitive damages in such circumstances. That use of Government funds would not further the mission of any federal agency or achieve any proper legislative goal. To the extent the Congress believes that it is necessary for the MSPB to have authority to impose sanctions for the rare failure of agencies to comply with its orders, the withholding of the salaries of recalcitrant federal officials now authorized by 5 U.S.C. § 1205(d)(2) is clearly sufficient.

III

Proposed section 1221(a)(1) of title 5 would allow any individual "adversely affected by a prohibited personnel practice" to initiate an action before the MSPB. In addition, proposed section 1221(f) of title 5 would allow an individual who initiated an action before the MSPB or an individual who was alleged to have been the victim of a prohibited personnel practice in an action brought before the MSPB by the Special Counsel to seek review of the decision of the MSPB in a district court. Granting such rights of action would result in both the MSPB and the district courts being overwhelmed.

The Comptroller General noted in his report to the Congress dated May 10, 1985, No. B-217796, and reproduced in Whistleblower Protection: Hearings Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service, 99th Cong., 1st Sess. (1985) (Serial No. 99-19) (hereinafter GAO Report) at 69, when commenting upon a proposal to allow employees to sue on their own behalf when they believe they have been subject to a prohibited personnel practice: "The Special Counsel now acts as an effective screening mechanism to limit the volume of complaints that reach the stage of adjudication." Absent the Special Counsel's screening of complaints, we would anticipate that the MSPB and the district courts would be required to adjudicate thousands of claims by disgruntled employees. Their dockets would become overburdened and they would have less time to devote to more meritorious claims. While it is in the realm of possibility that some small number of victims of prohibited personnel practices might be vindicated by the opening of the floodgates now protecting the dockets of the MSPB and the district courts, it is inconceivable to us that that fact would justify granting private rights of actions to individuals to seek redress for personnel actions taken by their agencies that they may not now appeal to the MSPB.

Employees and applicants for employment now can appeal the major types of personnel actions to the MSPB and seek review of the board's decisions in the United States Court of Appeals for the Federal Circuit or, if their claims involve allegations of discrimination, in the district courts. 5 U.S.C. § 7703(b). They may seek assistance from the Special Counsel if they believe that more minor personnel actions to which they have been subjected (or which they have not been granted, such as a promotion) were taken for a reason that is a prohibited personnel practice. The GAO Report indicates that this system has been working well. The Special Counsel has acted in a professional and appropriate manner in protecting the rights of whistleblowers, according to the Comptroller General:

> Comparing the facts with the legal requirements for a successful prosecution, GAO did not find that the Office of the Special Counsel closed any of the cases GAO reviewed without reasonable grounds to do so. GAO also did not find evidence that the whistleblowers in this sample fell victim to any lack of investigative effort on the part of the office.

GAO Report at 27.

The CSRA balanced the rights of employees and the burdens that would be placed upon the administrative appellate system and the judicial system if it had allowed review of every type of personnel action through direct access to the MSPB and the courts by employees. That balancing is at least as important today as it was in 1978. Granting employees direct access to the MSPB and to the courts would require a huge increase in the number of federal attorneys to defend those actions. In addition, it would require the district courts to spend enormous amounts of time on cases that, for the most part, probably would not merit the time spent upon them.

IV

Granting the district courts jurisdiction to entertain appeals by the Special Counsel and individuals seeking review of MSPB decisions would be a giant step backward. One of the purposes of the Civil Service Reform Act was to eliminate so-called dual review in personnel cases. That is, Congress recognized the concerns expressed by the judiciary in such cases as Polcover v. Secretary of the Treasury, 477 F.2d 1223 (D.C. Cir.), cert. denied, 414 U.S. 1001 (1973), that district court review of a record of an administrative adjudicatory body made little sense and, in fact, was a waste of time when the district court's decision was subject to appeal and the court of appeals had no reason to accord the district court's review of the record any weight.

Moreover, when Congress enacted the Federal Courts Improvement Act (FCIA) in 1982, it created the Court of Appeals for the Federal Circuit and granted that court exclusive jurisdiction over appeals from decisions of the MSPB in cases not involving discrimination. The reason for granting that court exclusive jurisdiction over most MSPB appeals was to foster uniformity in the federal personnel law area and to provide one judicial forum to guide the MSPB in its adjudication of cases. S. Rep. No. 275, 97th Cong. 1st Sess. 2-4, 7. Granting district courts jurisdiction over appeals from the MSPB in areas of federal personnel law over which the Federal Circuit now has jurisdiction would undo Congress's sensible centralization of those appeals.

V

Section 4 of the Bill would amend 5 U.S.C. § 2302(b)(9), which establishes the terms of the prohibited personnel practice of reprisal, to include a prohibition against agencies disciplining their employees for "failing to follow orders to disobey or not enforce a law." This amendment, if enacted, could cause wholesale insubordination throughout the Government to go unredressed. There are a multitude of federal statutes that are subject to interpretation as to their meaning, and there are numerous federal agencies that are required to enforce so many statutes that they have established priorities as to the manner in which they will carry out their enforcement responsibilities. Thus, there are instances every day in which federal supervisors direct their subordinates to take action (or not to act) based upon the supervisors' (or other agency managers') interpretations of statutes. Moreover, based upon their agencies' priorities, there are many instances every day involving decisions as to which statutes federal officials desire their subordinates to enforce.

The bill, if enacted, would appear to allow subordinate employees to determine, based upon their interpretations of statutes, whether to follow the instructions they are given by their supervisors based upon their supervisors' interpretations of the statutes. It also would allow subordinates to determine, with impunity, whether to follow their supervisors' instructions not to take action under particular statutes but, rather, to take some other action. The chaos that would be engendered can easily be imagined.

Mrs. Schroeder. Certainly. Thank you very much.

Congressman Horton, do you have any questions?

Mr. Horton. I don't have any questions. I haven't had a chance to read your testimony, but I certainly will. Perhaps we had it before but I just didn't have a chance to look at it.

I am concerned about the fact that the bill doesn't seem to meet with the approval of the Special Counsel or with the Department of Justice. I think there's a deficiency and I'm concerned about that deficiency. That is one of the reasons I am a sponsor of the bill. Apparently, your division doesn't seem to believe there is a problem, or do you?

Mr. Schiffer. There may well be deficiencies in existing law that we would be prepared to address with the subcommittee and its staff. But I think candor does require me to state that we do have a fundamental disagreement over the question of the type of balance that should exist in the system.

Mr. Horton. Do you think the system is adequate now?

Mr. Schiffer. Yes; I do, Congressman.

Mr. Horton. Do you think there is adequate protection for whistleblowers?

Mr. Schiffer. Yes; I do.

Mr. Horton. So, your recommendation would be that we do nothing?

Mr. Schiffer. Not to take steps of the nature proposed by this bill.

I should, I suppose, confess my bias, which I submit cancels out. I am, indeed, a Federal manager, but I am also someone whose entire professional life has been spent in government. I have a very real concern for the types of issues that concern this subcommittee.

Mr. Horton. Well, there is a reluctance on the part of people to disclose, and the purpose of this bill is to try to encourage that. From the testimony I have had from the different inspectors general, they have indicated to me that more than 50 percent of the information they get comes from people within the Government who are trying to give them information. If they're discouraged, they are not going to get that information which is necessary as far as the action of the inspectors general.

But your view is you've got enough on the books now and that you don't need any more?

Mr. Schiffer. We think, first of all, of course, this bill goes far beyond merely encouraging whistleblowers to come forward, but again, I share your concern that Federal law enforcement is dependent upon individuals being willing to come forward. I do think that adequate protections exist. I think the system is working.

I, frankly, think it's in the nature of all of us to be reluctant to come forward, and I suspect whatever bill is passed, if you go out and take a survey of the Federal work force, or a corporate work force for that matter, you're going to get probably the same minimal percentage of people saying they are concerned about coming forward. I don't know that you can ever address that legislatively.

Instead, it's the means and strength by which Mr. O'Connor and people in positions such as his show a willingness to take the types of actions they are legislatively required to take.

Mrs. Schroeder. Thank you.

Congressman Dymally.

Mr. **Dymally**. Thank you, Madam Chairman.

Mr. Schiffer, do you see any need for improvement in the old 1978 act with reference to this particular portion, whistleblowing, or do you just like the act, period, without any changes?

Mr. **Schiffer**. I'm never willing to sit and say there aren't areas that couldn't be the subject of consideration. I don't have anything specific on my mind today that I could recommend to you, but it is something we would be willing to consider, certainly.

Mr. **Dymally**. From your experience, have you come across any cases where the whistleblower was victimized for whistleblowing and you had to say to the manager: "We ought not to dismiss, ought not to lay off, ought not to reprimand, because we think this case has merits?"

Mr. **Schiffer**. That would principally be an area that Mr. O'Connor deals with. I'm, certainly, familiar with some of the cases he has brought where that has exactly been the case, that he had to take action.

Mr. **Dymally**. Where do you come in in this litigation process?

Mr. **Schiffer**. Representing the interests of the Government in court in a broad variety of litigation.

Mr. **Dymally**. In that role, have you had reason to counsel the OPM that they ought to take the side of the whistleblower?

Mr. **Schiffer**. We aren't typically litigating whistleblower cases, but we have indeed had cases on appeal, for example, in the Federal circuit, where some sort of adverse action has been taken against a Government employee, where on reviewing the record that was before the court we have counseled the agency that we have substantial doubts about whether we can properly defend the action that was taken.

Mr. **Dymally**. Given that sort of objectivity, then it is your conclusion the whistleblower has adequate protection in the present statute?

Mr. **Schiffer**. I suppose I have trouble with words such as "adequate" because there are always situations where an individual feels reluctant to come forward. But considering the importance of drawing a balance to which I alluded, I think the present statute does that and does it about as well as can be done.

Mr. **Dymally**. Thank you, Madam Chair.

Mrs. **Schroeder**. Let me take on some of the criticisms that you have. You say that the limitations on the President's power to dismiss the Special Counsel are unconstitutional. Our bill doesn't change the conditions that are there now. That's from 1978.

Mr. **Schiffer**. These are concerns that we did express in 1978. I suppose—yes, the chairwoman is correct. But there are some additional powers that are being engrafted.

Mrs. **Schroeder**. That's exactly the powers from 1978. We don't change that.

Mr. **Schiffer**. With some additional powers. But the fundamental problem is the same, yes.

Mrs. **Schroeder**. You are implying the bill changes the Administrative Procedure Act, and it doesn't. We do not change the standard of judicial review, so I don't know how you can then go on to say the ultimate Federal personnel office will become the Federal circuit.

Mr. **Schiffer**. I think we took that from opinions of Federal judges who have expressed similar concerns. In fact, it was some of those opinions that led to the enactment of the 1978 act.

Mrs. **Schroeder**. But we're not changing the Administrative Procedure Act in this bill, right?

Mr. **Schiffer**. You're changing some burdens of proof, for example, injecting in certain areas the notion of——

Mrs. **Schroeder**. OK. Let's do the burden of proof thing. We've got a real conflict here. You're saying that by changing the burden of proof to substantial evidence, we stack the deck in favor of the employee. Mr. O'Connor says that it doesn't have any effect.

Mr. **Schiffer**. I'm not sure if we're saying different things. It may be Mr. O'Connor is questioning whether in the last analysis it is going to make a difference. I suppose I'm expressing in part a technical concern and in part a human concern. The technical concern is that that is what we regard as a somewhat low threshold: Substantial evidence, and the human concern is for the manager who is branded as a repriser, where, in fact, the preponderance of evidence may be the other way. But because someone can say there is substantial evidence in the record to indicate this, we don't go further to see wherein lies the preponderance.

Mrs. **Schroeder**. OK. I am also a little distressed in that you say you don't want MSPB to conduct disciplinary actions against members of the military.

What would you suggest to punish individuals that take prohibitive personnel actions against civil servants for reporting waste?

Mr. **Schiffer**. I think we read the bill somewhat broader. My first reaction was I would have welcomed this when I was an Army private, and perhaps we're reading it too broadly in that sense. But members of the uniformed military service are subject to the Uniform Code of Military Justice at the present time. That code contains very adequate sanctions for people who abuse their subordinates.

Mrs. **Schroeder**. Who abuse them. But we're talking about prohibitive personnel practices dealing with whistleblowing.

Mr. **Schiffer**. Yes, ma'am. They are subject to the Uniform Code of Military Justice for, I would assume, almost any of the types of conduct we're talking about in this bill.

Mrs. **Schroeder**. I would be interested if you do have cases where military people who have retaliated against civilians who have reported waste have been tried under the Uniform Code of Military Justice. Because we are not aware of any such cases, we felt that not covering military personnel was a great loophole.

I want to know how many times the Department of Justice has taken a case on behalf of an employee against an agency to court on appeal.

Mr. **Schiffer**. That is not a responsibility of the Department of Justice. In this area, we don't represent Federal employees in that sense. Our client is the U.S. Government.

Mrs. **Schroeder**. So, if Special Counsel brings a case and MSPB rules against them, that's it, right? The Justice Department never decides which side to represent?

Mr. **Schiffer**. The individual can go forward but the Department of Justice would not be representing the individual in the case you posit.

Mrs. **Schroeder**. To put it in Congressman Brooks' terms, you're the "junkyard dogs," right?

Mr. **Schiffer**. When you're talking about the individual, you mean the aggrieved employee and not the employee against whom disciplinary action is taken?

Mrs. **Schroeder**. So, you don't ever do that.

Do you think the current balance between agencies and whistleblowers is appropriate?

Mr. **Schiffer**. From everything I understand about the present system, yes, ma'am.

Mrs. **Schroeder**. Have you looked at the Mount Healthy test?

Mr. **Schiffer**. I certainly have.

Mrs. **Schroeder**. And you think that's appropriate?

Mr. **Schiffer**. Yes; I can, without taking your time—and I don't mean to make you sorry you asked it—I will just take one moment. Mount Healthy was a case where a teacher was not reemployed. The teacher went to court. The circumstances, very quickly, were that the teacher had done a number of things, including cursing students, making obscene gestures at female students, having physical altercations with other teachers, but also had disclosed a memorandum written from his principal to other teachers. He had disclosed that memorandum to a radio station. The teacher was not reemployed for the next school year. The memorandum from the principal informing him that he wasn't being reemployed made reference, among other things, to the memorandum, but also to other acts.

The teacher went to district court and the district court found that the disclosure of the memorandum had been a constitutionally protected activity and that the teacher should be reinstated because he had been engaging in a constitutionally protected activity.

The Supreme Court unanimously said this was correct, up to the point that I just mentioned, but it said the district court should have gone further and should have looked at the question of whether the teacher would not have been rehired in any event.

The court said:

> A rule of causation which focuses solely on whether protected conduct played a part, substantial or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutional conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the district court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire and does, indeed, play a part in that decision. Even if the same decision would have been reached had the incident not occurred, the constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.

I think that is a correct result.

Mrs. **Schroeder**. One of our problems is, whenever we have seen a whistleblower case, there tends to be a piling on. Any supervisor learns that you don't just say "I'm firing you because you are a whistleblower." You add in all sorts of other things. The burden of proof, I think, becomes very critical and that is one of our very major concerns.

You also——

Mr. SCHIFFER. Let me interject that that's a very valid concern and I understand the agency does have the burden of proof in those situations, to show it was not the protected conduct that gave rise to the action that was taken and the adjudicative body has to pass upon that.

Mrs. SCHROEDER. You're absolutely right. But I must say, I met with many Federal employees, even last night, and they said this will never work until you put more of a burden on supervisors because they're all on to it. You know, supervisor manual X-Y-Z says this is what you throw in as boilerplate and that's how you move forward. Once again, you have the testimony of higher ups versus the testimony of lower downs and it's a much easier burden of proof than the employee has. That's a great concern.

You also say, though, that the power of the Special Counsel to circumvent OMB is unconstitutional. Once again, I want to point out that we're not changing the 1978 law. You're aware of that?

Mr. SCHIFFER. In general, that's correct. These are concerns, as I said, that we expressed in 1978.

Mrs. SCHROEDER. So, has Special Counsel been acting illegally for 8 years?

Mr. SCHIFFER. All we're suggesting is that these points raise constitutional doubts. There are many areas, in the interplay between the branches of Government, that have not been resolved within what is really a short period of time, 6, 7, 8 years.

Mrs. SCHROEDER. I really feel that employees who bring their own actions and have to pay for their own costs unless they win acts to effectively screen out cases. The way I read it, you don't think that free market system works.

Mr. SCHIFFER. I think the system does work. Maybe we're——

Mrs. SCHROEDER. Well, in our bill we allow that to happen. I take it you're not pleased with that. If employees go to the private sector, go to the Federal court, they are stuck paying their own way.

Mr. SCHIFFER. The MSPB awards legal fees at the present moment to people who succeed in their cases.

Mrs. SCHROEDER. If they succeed. But we're talking about if they decide to go to Federal court.

Mr. SCHIFFER. I think you're talking about a fairly limited universe of cases, where people won't be able to do that.

Mrs. SCHROEDER. You're not worried about that, then, if we do that? You're not worried about a private right-of-action, in other words?

Mr. SCHIFFER. I am very much worried about the additional causes of action that will be created.

Mrs. SCHROEDER. Then why worry about the private right of action, if you agree with me that the free market has a certain check on that?

Mr. SCHIFFER. Because there are a number of other concerns that I have tried to express. One, the inability of the Federal courts to be the ultimate arbiter of every personnel decision that's made, at least the personnel decisions covered by this bill——

Mrs. SCHROEDER. But they're not going to be, because most people can't afford to go to the Federal court. One of the criticisms that we get is that people have lost so much confidence in Special Counsel that they want only the private right of action. We tried to work out a balance and say there should be a private right of action available, and if you opt for that manner, that's the way you have to stay; you can't then run back to Special Counsel later. But if you opt to go that way, OK. Then you're shutout of the Special Counsel. If you opt to go to the Special Counsel, fine.

I hear you saying you don't like our giving the private right of action. Many of the whistleblowers think that we sold out by doing anything other than just private actions and trying to figure out how to fund them.

I know Special Counsel was accusing us of doing a legal aid type of thing. We are not doing legal aid because we're not funding people going to the Federal court. They still have to do it themselves.

Mr. SCHIFFER. I apologize for taking so long to grasp the question. I suppose the candid answer is that I'm not satisfied that the free market system will work under those circumstances to avoid a glut of civil cases in the Federal court.

Mrs. SCHROEDER. Why? Who do you think is out there to fund people? How wealthy do you think Federal employees are?

Mr. SCHIFFER. I can speak from personal experience that the answer is not very wealthy. But I think fees are also not as outrageously high as one might think and we——

Mrs. SCHROEDER. Lawyers don't work for free.

Mr. SCHIFFER. No, but individuals can, for example, bring suit without attorneys. In this area they do so very frequently, and I assume with this bill exponentially larger numbers would do so.

Mrs. SCHROEDER. I think maybe you see a bigger threat there than I do. I really think the private market system will work to govern the numbers.

Mr. SCHIFFER. I think again my problem is a parochial one. I work in a division which has seen an expansion of the caseload in the limited areas where we're responsible, the expansion of the caseload at rates like 20 and 40 percent annually, to the point that I see 50,000 cases under the aegis of the Civil Division. So I must admit to that bias. I think there will be no reluctance on the part of people to take advantage of newly-created causes of action.

Mrs. SCHROEDER. I think all those things will be unchanged.

Could you please explain to me why the Justice Department appealed to the court against the Special Counsel in the *Filiberti* case?

Mr. SCHIFFER. There are areas of litigation where we believe it to be an appropriate exercise of our responsibilities to represent Federal Government employees who have been sued or against whom some action has been taken. This was one such case.

Mrs. SCHROEDER. Could you just explain why? What were the facts of the case that——

Mr. SCHIFFER. Not only am I not presently sufficiently familiar, but I don't think I should go into detail. These were Navy employees against whom certain action was ordered by the Merit Systems Protection Board——

Mrs. SCHROEDER. Can you do it for the record?

Mr. SCHIFFER. I would be happy to, but again, you know, I would offer a summary. I can furnish whatever brief we have filed or will file. I don't think I should argue the case in this forum.

Mrs. SCHROEDER. But you can put something in for the record?

Mr. SCHIFFER. Yes, ma'am. As I said, I can state presently that we had a request from the Department of Defense to furnish representation. We considered that request, as we have in other cases, in some of which we have turned down such requests. We decided that under the circumstances of this case Federal employee managers were entitled to representation.

Again, as a Federal employee, and as a Federal employee manager, I think that I have rights, too, to confess to my bias once again.

Mrs. SCHROEDER. But you were defending an agency against Special Counsel in that case, right?

Mr. SCHIFFER. We were defending agency employees against whom the Merit Systems Protection Board had ordered certain action be taken.

Mrs. SCHROEDER. Do you have anything further?

Mr. HORTON. No.

Mrs. SCHROEDER. Thank you very much. We appreciate your being here.

Mr. SCHIFFER. Thank you, Madam Chairwoman.

Mrs. SCHROEDER. Our final witness this afternoon is Mr. Richard Post, Associate Director of the Office of Personnel Management.

STATEMENT OF RICHARD B. POST, ASSOCIATE DIRECTOR FOR STAFFING, OFFICE OF PERSONNEL MANAGEMENT

Mr. POST. Thank you, Madam Chairwoman, Congressman Horton.

I appreciate the opportunity to present OPM's views on H.R. 4033. That bill is entitled "The Whistleblower Protection Act of 1986," but despite that title, we view it as extending beyond whistleblower protection. In fact, we believe that it proposes a major restructuring of the functions and relationships of the Office of Special Counsel and the Merit Systems Protection Board.

Therefore, obviously it is of prime interest to those agencies rather than OPM and we would defer to them on the substance of the legal and litigational aspects of it.

However——

Mrs. SCHROEDER. Can you tell us why MSPB has refused to come down?

Mr. POST. Can I tell you why?

Mrs. SCHROEDER. Yes.

Mr. POST. I have no information to enlighten you on that.

Mrs. SCHROEDER. In other words, we're a little frustrated, if you say you can't tell us exactly what you think because it really deals with MSPB, but MSPB's chairman has said "No, we won't come."

Mr. POST. I can give you some opinions that I see as to the impact on MSPB, but I really would defer——

Mrs. SCHROEDER. You defer to them and they won't come, so it's a little frustrating to the subcommittee. But proceed.

Mr. POST. I understand that.

What we are concerned about is what we see as a proliferation of mechanisms which we really don't think would help the cause of whistleblowers that greatly and impacts on the ability of agencies to effectively and efficiently manage their organizations.

Certainly there is no question of the administration's commitment to the whistleblower. In 1980, the President promised support and protection for those who disclose fraud, waste, and abuse in Government, because it is clear that legitimate whistleblowers not only save the taxpayers valuable tax dollars, but they strengthen the merit system by helping to ensure honesty in Government. So the question is, how can we best make sure that whistleblowers are protected?

We agree with the Special Counsel that the best protection against retaliation is vigorous prosecution of those who have committed personnel practices which are prohibited against those who have blown the whistle and disclosed fraud, waste, and abuse.

We think there have been some recent successes, which Mr. O'Connor identified, that show some rather dramatic examples of vigorous enforcement. Much has been made of the low percentage of actual prosecutions of whistleblower cases. To us, we think there is a simple explanation for that, and we explain that by referring to the General Accounting Office report that was released, where it showed that, in fact, few of the cases received by the Office of the Special Counsel have sufficient merit to warrant prosecution. So by screening out such cases and working to resolve those cases informally, vigorously prosecuting the legitimate whistleblowr cases, we think the Special Counsel has made great progress in protecting whistleblowers and promoting the efficiency of the Government.

Although the facts do not support a conclusion that there is a problem, the bill would radically alter the system for handling whistleblowers and it would restructure the relationship between the Board and the Special Counsel. As I said, I will defer to them on those procedural changes and the expansion of litigation authorities proposed by the bill. But I would like to point out a general concern that we have about the bill's impact on personnel management in the Federal Government.

I believe that there is a balance that must be struck between providing greater protection for whistleblowers and the necessity for efficient and orderly operation of agencies. As GAO has testified, and I quote, "Unrestrained whistleblowing could raise levels of dissidence and insubordination to the point where efficiency could be affected." Because of the proliferation of remedies that we see in this bill, we think the potential is there for disgruntled employees to flood the Office of the Special Counsel and the Merit Systems Protection Board with spurious complaints. Because of the attorney-client relationship so clearly addressed by Mr. O'Connor, we believe that the bill requires that that relationship be established with every complainant who walks through the door.

The impact of that relationship and all that goes with it would, in effect, deprive the Special Counsel of any opportunity to screen out the frivolous cases and prevent it from concentrating its resources on legitimate whistleblowers.

To compound the problem, the bill provides for judicial reviews in the U.S. district courts for employees who are dissatisfied with the decisions of MSPB. That provision would weaken the authority of both agencies and place a further strain on the already overburdened Federal court system, when we have in place a functioning administrative procedure for resolving whistleblower complaints.

I think that the major flaw of this bill is that it does not recognize that the Office of Special Counsel is but one link in the process for resolving whistleblower complaints. As GAO concluded, there are many other institutions, including the President, the Congress, the media, the courts, agency leadership and appeals systems, the Merit Systems Protection Board, and the offices of inspectors general, that are also involved in support for the role of whistleblowers in Government. It may be, as GAO suggests, that the reason the Office of Special Counsel receives so few legitimate whistleblower cases is that most of these are resolved through other means. And from our perspective, that is as it should be.

Certainly the President has expressed his support for whistleblowers. If there are problems in the current system, we obviously need to work to ensure that those legitimate whistleblowers can step forward without fear of reprisal. We do not believe their cause will be helped, however, by making the Office of Special Counsel the first resort for those employees who are already inundating the Special Counsel with grievances not related to the necessity for protection of legitimate whistleblowers.

So we think this bill, as it stands, would lessen the likelihood that the legitimate whistleblower's case would receive the proper attention and increase the probability of disruption to agencies at a time when everyone is being asked to do more with less. For this reason, OPM is opposed to this bill.

Thank you.

Mrs. SCHROEDER. Thank you very much.

Congressman Horton, do you have any questions?

Mr. HORTON. No, I don't. Thank you very much.

Mrs. SCHROEDER. Well, let me ask a few.

You say the bill is creating a proliferation of mechanisms. Now, you're right if plural means more than one, but I only count two. That is Special Counsel and private right of action. Am I missing something?

Mr. POST. Well, maybe proliferation is too strong a word.

Mrs. SCHROEDER. So you don't count more than two, either. Okay.

You speak of the recent successes of the Office of Special Counsel. Could you list some for us, and could you tell us whether OPM intervened for or against the Special Counsel in those cases?

Mr. POST. Well, I really couldn't. My reference is the GAO report of cases, some of the celebrated media cases, the media coverage of cases, the Starett or Spanton cases. But I do not have any cites that I could——

Mrs. SCHROEDER. Could you maybe get those for the record?

Mr. POST. Yes, certainly.

Mrs. SCHROEDER. Why do you think this bill is going to give Special Counsel more complaints than they get now?

Mr. POST. The reason relates to the attorney-client relationship, the fact that the bill says an attorney-client relationship must be established with every person who walks through the door and complains about prohibited personnel practices.

Balancing that against what I have read in the GAO report, about the high percentage of those complainants that would not merit consideration as whistleblowers, leads me to the conclusion that there would be this inundation. The impact on MSPB would be that this bill, in my opinion, would, in effect, transfer that day-to-day trade in large numbers directly to the Board, since there would not be that screening out process that now exists.

Mrs. SCHROEDER. Could you show me the section of the bill that says there is an attorney-client relationship established with everyone who walks through the door?

Mr. POST. 1212(a)(1), I believe, is the section. "The Office of Special Counsel shall represent and act as legal counsel on behalf of employees alleging——"

Mr. HORTON. What page are you reading?

Mr. POST. I'm sorry. That's page 14, line 10.

Mrs. SCHROEDER. It doesn't say all employees alleging. I assume that allows the normal discretion that's been going on, to say "this is not a prohibited personnel practice. Thank you very much. You just came through the wrong door."

Mr. POST. I would defer on this to the Office of Special Counsel and their interpretation of this. But my reading led me to believe that that is what this bill says.

Mrs. SCHROEDER. I want to make it clear that we intended it to be discretionary and we did not mean that the Office of Special Counsel was to say to everybody who walked through the door, "whether or not you have a prohibited personnel practice alleged, we are now your lawyer." I found Special Counsel's interpretation of that rather startling and I hope that you look at that, too, because it does not say all employees. We want to make it perfectly clear that that's not where we're going.

I want to ask why you think an employee's right to seek corrective action is going to harm agency efficiency.

Mr. POST. I guess in particular I'm concerned about the broad expansion of the power of stay that is contained in here, going from 15 to 60 days on motion of the Special Counsel and from 30 to 240 days on motion of the Board, and for the duration of any appeal that is underway, until there's a final disposition, during which the employee remains on the rolls. It seems to me like a rather drastic expansion of that power and an expensive one in terms of the disruption in the agency by perhaps being subjected to delaying tactics on the part of the employee or the employee's counsel, to make sure that that process lasts as long as it conceivably could.

That concern is really behind our comment there.

Mrs. SCHROEDER. I notice you quote GAO and we have quoted GAO because we think GAO did an excellent job of looking at this. They found over 99 percent of the cases had not moved, which is fairly startling. Between that and ourselves, we have been unable to find one single whistleblower who has been satisfied with the Office of Special Counsel. That's been a real concern to the subcommittee.

There may be one out there somewhere, and if they're out there, we would like to see them. Because we keep hearing from you and others that Special Counsel is doing a terrific job, but from the people they are supposedly protecting we have yet to find the first person saying "that's right, they did a great job."

Why do you think there is this great gap? Doesn't that concern you as a manager, as an offical of the Office of Personnel Management? Doesn't that worry you?

Mr. POST. Certainly I'm concerned about legitimate whistleblowers who do not come forward or feel they cannot come forward for fear of reprisal.

Mrs. SCHROEDER. That part we haven't even gotten to, because we're talking about the ones who did come forward and had an experience with the Office of Special Counsel.

Mr. POST. I guess my view is that, as I read the GAO report, and as I view the mechanisms that are now in place—I forget the number in the thousands of calls that are received, let's say, for example, in the Inspector General hot line at the Department of Defense—those are dealt with by the mechanisms that are in place there. I have no numbers at all that I could cite in terms of what kinds of fraud, waste, and abuse are identified and recovered and so forth.

But that mechanism, to me, is much more significant in terms of dealing with this issue of fraud, waste, and abuse in Government, rather than having the Special Counsel set up as the first line or the first resort.

Mrs. SCHROEDER. You could almost do away with Special Counsel?

Mr. POST. No, I wouldn't say that.

Mrs. SCHROEDER. It sounds like it.

Mr. POST. I think GAO said that Special Counsel is doing a good job. I mean, that's what I read. Maybe I didn't read those words that you read. They said they could not find an unsatisfied whistleblower, as what I recall from that report.

Mrs. SCHROEDER. We read it more that they were doing a good job of not finding whistleblowers. It may be something in between, where the truth is.

As I say, I'm concerned that you don't worry a little more about the Office of Special Counsel and their concern about whistleblowers.

Let me ask another question. Where in the bill did you find the requirement for de novo court review of MSPB decisions?

Mr. POST. Well, it's a presumption. I did not find the word "de novo" in the bill.

Mrs. SCHROEDER. I didn't find it, either.

Mr. POST. The bill says judicial review in the district courts, and the presumption is, because that is a trial court rather than appellate court, that it would be a de novo review. So, you know, that's a debatable point. But our attorneys suggest that the likelihood is there in terms of how much deference the district court judge would be given to the administrative record.

The bill does not require de novo, I acknowledge that.

Mrs. SCHROEDER. And we're not repealing the Administrative Practices Act.

Mr. POST. Right.

Mrs. SCHROEDER. Lastly, just let me ask you about Loretta Cornelius. There's a whistleblower in your own agency. Doesn't that pain you? Here is a person who comes to the Senate and tells the truth and gets fired. I really hear you saying——

Mr. Post. I can't comment on that case.

Mrs. Schroeder. I really hear you saying that to do anything about it might be inefficient; you might have had a stay of action and had to go to court and it would cost money.

Mr. Post. I can't speak to the particulars of that case or to the reason behind the action that was taken, other than what's in the public arena.

Mrs. Schroeder. But you don't feel that colors your feeling about any of this?

Mr. Post. My feeling is that we ought to protect legitimate whistleblowers in the Government and provide——

Mrs. Schroeder. That's the subcommittee's feeling, too.

Mr. Post ¢continuing!. And provide a balanced system, weighing that against agency efficiency.

Mrs. Schroeder. I guess our controversy is what's legitimate. I have a feeling we have a different definition; and what's a balance, again I have a feeling we have a different definition; and what does agency efficiency mean.

Do you think President Reagan's statement is incorrect about the waste in different agencies, if whistleblowers were just protected better, and do you think Peter Grace is incorrect?

Mr. Post. Not necessarily. I believe potentially the numbers are huge as to what is there and——

Mrs. Schroeder. So for efficiency's sake, wouldn't we do better to find a system where we could get that out? I mean, either they're wrong, or if it's out there, and say they're off $10 billion, there is still $15 billion to be found.

Mr. Post. We should have a system—What I'm saying is we should have a balanced system, and I think there are effective mechanisms in place.

Mrs. Schroeder. Thank you very much for being here. As I say, we are frustrated that OPM thinks we have a balanced system in place. I would say even the President and Peter Grace would disagree that things are running well. We'll keep working and we thank you for appearing.

Did you have anything further to ask?

Mr. Horton. No.

Mrs. Schroeder. Thank you very much. With that, the hearing is adjourned.

[Whereupon, at 2:37 p.m., the subcommittee was adjourned.]

WHISTLEBLOWER PROTECTION ACT OF 1986

FRIDAY, FEBRUARY 21, 1986

House of Representatives,
Subcommittee on Civil Service,
Committee on Post Office and Civil Service,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 304, Cannon House Office Building, Hon. Patricia Schroeder (chairwoman of the subcommittee) presiding.

OPENING STATEMENT OF HON. PATRICIA SCHROEDER

Mrs. **Schroeder**. I am pleased to welcome you to the second hearing the Subcommittee on Civil Service is holding on H.R. 4033, the Whistleblower Protection Act of 1986. Yesterday, in our first hearing, we heard the views of the Special Counsel and the Department of Justice on this legislation. Today, we are eager to learn the thoughts of Federal employee unions and public interest and advocacy groups.

Whistleblower protection is not a narrow issue of civil servants' rights. It is an issue of very broad concern and impact. Americans want the plug pulled on cost overruns; they want proper meat inspections and a safe air travel system. They want fees and penalties collected for abuses in construction projects and mining contracts. And they don't want to pay $700 for toilet seats. It is well-recognized that whistleblowers can help us achieve both cleaner Government and our deficit reduction goals, if only we let them.

To do this, we must correct our current system so that those individuals who know of abuses are provided the opportunity and protection to step forward. I feel that H.R. 4033 is a good start. And I know that our witnesses today will help us to further refine and improve this legislation.

The first witness we have this morning is George Goldberger, president of Citizens Against Government Waste. We would like to call him to the table at this time.

STATEMENT OF GEORGE S. GOLDBERGER, PRESIDENT, CITIZENS AGAINST GOVERNMENT WASTE

Mr. **Goldberger**. Good morning, it is a pleasure to be here. My name is George Goldberger. I am president of the Citizens Against Government Waste. With me is John Grobowski, our director of government affairs at Citizens Against Government Waste. We appreciate the opportunity to address the subject of whistleblower protection.

I might add that Citizens Against Government Waste is a national, bipartisan, educational organization which seeks to promote the implementation of the Grace Commission recommendations and other measures to reduce waste and inefficiency in Federal spending.

We are in support of the whistleblower concept and view this as an important management tool along with other management inputs. We are often contacted by Government employees who feel compelled to report instances of waste, fraud and abuse which they have personally witnessed in the course of their work and which they wish to eliminate.

In some instances where the writer or caller wished to remain anonymous, we attempted to piece the story together to the best of our knowledge and passed it on to the appropriate Government agencies.

In other instances where we have the permission of the individual or individuals involved, we have taken the initiative to bring their observations to the attention of the inspector general offices of the relevant agencies, or to congressional committees with jurisdiction over the agencies, for review and possible action.

I should add that in all cases we have advised government employees who have encountered potential improper activities to first make every possible attempt to work within the system before going the whistleblower route.

For the sake of clarification, we think that it is important to point out that our focus at Citizens Against Government Waste is really on trying to address problems of a systemic nature rather than focusing on those singular instances and consequences of employee identified waste.

Still, we are very much aware of the key role that whistleblowers have played in exposing waste, fraud, and abuse. And, we are very mindful of the fact that many whistleblowers who deserve to be commended—or even rewarded—for coming foward with their disclosures have instead been made to suffer by the shortcomings of the present system of review for job-related actions.

The goal, of course, of any whistleblower program is to design a system of review for job-related actions that will afford a high measure of protection for bona fide whistleblowers but will not serve as an instrument for the waging of personal vendettas against managers, while at the same time encouraging effective management practices.

As any private or public sector executive can tell you, accomplishing this balancing act can be a very difficult task. Curtailing proscribed personnel practices is one thing; establishing iron ricebowl job protection for Federal employees is yet quite another matter.

It appears to us that the Whistleblower Protection Act (H.R. 4033) introduced by you and Representative Horton is an attempt to strike this balance. I have a few brief comments about selected provisions of the bill.

In regards to the Special Counsel, we hope that the bill explicitly charges the Special Counsel with responsibility for the protection and legal representation of whistleblowers. But it leaves the Special Counsel with appropriate discretion to withhold assistance from individuals whose charges cannot be substantiated. This is an appropriate filtering process, in our estimation. Only after it is determined that the whistleblower's gripe or complaint is valid should protection be provided.

With respect to confidentiality, we would like to add that the provision for protection from disclosure of the identities of employees or applicants providing information to the Special Counsel about violations of law or gross mismanagement, wastage of funds, abuses of authority, or substantial dangers to public health or safety would have the side benefit of promoting fuller disclosures of questionable Government practices.

On requirements for agencies to investigate information transmitted by the Special Counsel, we think this would lead to more prompt correction of the wrongful practices that precipitate whistleblowing.

Next, in regards to direct appeals to the Merit Systems Protection Board for corrective action, we think this alternative to first presenting complaints to the Special Counsel should serve to make the Office of Special Counsel more responsive to whistleblower grievances.

On the subject of substantial evidence standard, this shift in the burden of proof requirement of preponderance of evidence to substantial evidence, the latter being a lesser standard, should benefit many whistleblowers victimized by prohibited personnel practices but not in a position to point directly at conclusive evidence that such practices have taken place.

Next, recovery of costs, including attorney's fees, where the Merit Systems Protection Board finds that prohibited personnel practices have occurred. This should help many whistleblowers to obtain the legal counsel they need to bring an effective action before the Merit Systems Protection Board.

Lastly, protection for whistleblowers who cooperate with or disclose information to the inspector general of an agency, or to the Special Counsel, or who refuse to disobey or not enforce a law. This is a very important provision. Here we would just like to mention that we have great admiration for what the inspectors general have accomplished with respect to uncovering waste, fraud, and abuse since their inception. This provision should strengthen their hand in this enterprise.

Let me conclude by saying that this is an ambitious bill, in our opinion. It is difficult at this point in time to foresee how all of its provisions pertaining to the Office of Special Counsel and the Merit Systems Protection Board would work out in practice. They may well result in dramatic changes in activity which could then necessitate further changes in structures and procedures.

For this reason, we urge that the implementation of these provisions be closely monitored with a view toward making prompt adjustments if the need arises.

However, it appears to us that this bill clearly has the potential to provide enhanced protection to bonafide whistleblowers and promote better government in general.

We hope, therefore, that all Members of Congress will give it their earnest consideration. Thank you very much. That is the end of our formal remarks, and we would be happy to answer whatever questions you may have.

Mrs. SCHROEDER. Thank you very much, and I appreciate your being here. I also appreciate your conclusions, having helped author and draft the first whistleblower protection legislation. I am discouraged at how the law ended up functioning and you are right to keep monitoring and trying to change it as rapidly as possible.

We have had such trouble with the wagons in a circle mentality of the Special Counsel. It has just not been easy.

We had some testimony yesterday that was really rather discouraging. Obviously, the administration feels that everything is fine.

Many have said that the reason the Special Counsel has heard from so few whistleblowers is that there is really no waste and abuse to report in the Federal Government.

My guess is your group probably has looked at the systemic overall thing. Is it the kind of thing that whistleblowers could expose?

Mr. GOLDBERGER. Let me say that, as you know, we worked with the Grace Commission, and we identified 2,478 different recommendations dealing with the elimination of waste and mismanagement. So, we certainly feel there is a lot of systemic waste in the Federal Government.

The nature of the title of our present organization Citizens Against Government Waste, is such that people tend to look it up in the phone book and say, well, this is an organization that maybe would help me.

And we have, at times, received calls or letters from Federal employees saying, we know about you guys, you have identified waste in the Federal Government. Let me give you some specific examples, and I tried to do this or that and it has not worked.

We have not received many of those, nor are we, in all fairness, really equipped to investigate and handle those.

In any situation like this, we try to be as professional as possible and as helpful and guiding as possible, but we certainly have received a sufficient number over the last couple years that I would have to say to you that there are all kinds of examples of ongoing waste and mismanagement and fraud.

We have not focused in on fraud, really, but certainly in terms of waste and mismangement.

Mrs. SCHROEDER. On the Armed Services Committee, I also chair the Grace panel. Mr. J. Peter Grace appeared before the panel, and talked a lot about the different systemic problems his commission had uncovered.

I know Congressman Horton has been one of the prime sponsors of inspectors general working hard on these problems through his other hat on Government Operations.

I guess our fear is how we get a bill that makes sure we have a watch dog and not a junkyard dog who only protects the junk.

When you look at systemic things, have you been able to find any way that you can keep that from transpiring?

Mr. GOLDBERGER. We have looked at this, and you have to look at the various areas. You have to look at procurement and at the systems in procurement and what sort of protections you have there.

You have to look in each of the areas, data processing, all of those. You have to—you are talking of different systems in each case.

I might add that four years ago when we started with the Grace Commission's work in 1982, one of the things we were quite pleasantly surprised by was that there had already been quite a bit of work done by the inspectors general and GAO and CBO on the identification of waste, and that our frustration or really everyone's frustration was that while the reports were there, there wasn't very much action being taken on any of these things.

Our view with respect to this bill is that this bill tends to shift the balance—no one knows exactly to what extent—and we will have to see, but it tends to shift the balance so that these people would be more encouraged to come forward with specific examples of waste, and perhaps they will then focus in.

In some cases, you might find that as whistleblowers come forward with examples, these are indicative of systemic problems that have been previously identified by the Grace Commission or GAO and so on.

But the most—one of the more difficult tasks here, as we see it, is that it is really difficult to foresee at this point just what the shift will cause in terms of the work load in the various pertinent offices.

That is, are you going to end up, if this bill becomes law, with a tenfold increase in the number of whistleblower complaints—or a hundredfold increase?

That is why you have to look at this very, very carefully, because you have a situation now where there is a certain flow of complaints. If this becomes law, is that flow going to become 100 times bigger so that you are going to have a management problem in dealing with all these complaints? Where you are now handling a hundred complaints a month, are you going to have 1,000? 10,000? 100,000? Then you would have a bigger management problem than a whistleblower problem.

Mrs. **Schroeder**. I am pleased to have you point that out. I think it was exactly what we heard testimony from Peter Grace on—that there have been all sorts of documentation of waste, but it has not changed. Mr. Grace felt it was because the powers that be didn't let anybody try and deviate from the system.

Mr. **Goldberger**. That is right.

Mrs. **Schroeder**. So, I am pleased to have you say you think maybe this new legislation corrects that law a little more. We certainly will watch it to be sure it doesn't go some cockeyed way we didn't envision. None of us have perfect forward vision. But thank you very much.

Mr. **Goldberger**. Thank you. It is a pleasure being here.

Mrs. **Schroeder**. Our next witness is the legal director of the Government Accountability Project, Mr. Thomas Devine.

We would like to welcome him and ask him to come to the table. Thank you very much for being here.

STATEMENT OF THOMAS DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. DEVINE. Thank you.

Mrs. SCHROEDER. Thank you for appearing. We would appreciate if you would like to summarize your statement toward what the bill would do.

Mr. DEVINE. Thank you for inviting the testimony of the Government Accountability Project. We are a nonprofit, nonpartisan organization that provides legal representation for whistleblowers. I would like to add that my testimony would not have been possible without the conscientious assistance and valuable research of law students from the Antioch Law School here in town.

Mrs. SCHROEDER. I hope you save it.

Mr. DEVINE. I hope it is saved, too. I think whistleblowers need them as much as Government accountability or your bill sometimes. You and Representative Horton have displayed bipartisan leadership to reestablish first amendment rights in the civil service. In our opinion, your initiative is none too soon.

Yesterday, we had an ironic dose of negative leadership from the administration. It is ironic, because it would defeat President Reagan's repeated pledges to balance the budget, in large part through whistleblowers who expose waste, fraud, and abuse. Yet, Special Counsel William O'Conner, who warns whistleblowers not to stick their heads up if they don't want them shot off, advised you he doesn't want to deepen the legal foxholes that are supposed to protect dissenters.

Then there was the "empty chair" for the Merit Systems Protection Board yesterday. Although the MSPB may largely replace the Office of the Special Counsel under this bill as the forum to challange reprisals, no member of the Board cared enough about freedom of speech to attend.

Finally, there was the curious spectacle of three administration representatives who claim that an estimated $18 million cost would be too expensive to curtail waste conservatively estimated at $25 billion. Even if their cost figures had been accurate, that flawed reasoning is penny wise and pound foolish to the point of being a caricature.

At GAP we don't take positions favoring or opposing any legislation, but I think that the issues in this bill are very clear from answering four overview questions.

In the first, from a no-fault perspective, do whistleblowers need increased protection? Yesterday, Mr. O'Connor stated that supporters of stronger legislation have been manipulating statistics from MSPB studies and that whistleblowers have less fear of reprisal now than they used to.

I would like to quote from a January 16, 1985 press release by the MSPB about their study. "There has been a significant increase in fear of reprisal as the reason given for not having reported fraud, waste, and abuse." They cited that reason as 37 percent this time around versus 20 percent in 1980. Now, who is manipulating what?

Second, however, I think the debate is somewhat academic. In light of Mr. O'Connor's own advice that whistleblowers stay confidential at the risk of getting their professional heads shot off, I don't think it matters too much if things are a little better or somewhat worse. Either result is unacceptable.

In fact, one of the primary authors of the MSPB study stated it almost a truism that public identification of whistleblowers leads to negative impact, and, in part, because of that the author concluded about 500,000 Federal employees claim to know one or more wasteful illegal activities every year, and approximately 70 percent of them keep it to themselves.

Mr. O'Connor said he doesn't think there are that many whistleblowers, because not that many come to his office. That is why we need this bill. Whistleblowers with good cases avoid the Office of the Special Counsel. The lawyers in the Federal Bar in Washington, DC also avoid that office unless there is no other option. We only send people there if they don't have much left to lose.

Finally, the Department of Justice said this might stack the deck against managers in favor of dissenters. In light of the record I have just described, we believe that it is time to give whistleblowers and, therefore the public, the benefit of the doubt if there is am imbalance.

The second overview question is, do whistleblowers need to be protected from the Office of the Special Counsel? Sadly, the answer is yes, and I think that is illustrated by comparing Mr. O'Connor's conclusions with the facts and judgement behind the neat statistical categories he offered yesterday. I think perhaps it is a problem of definitions.

As one who has heard the bitter complaints of countless whistleblowers, the Special Counsel's definitions had an Alice-in-Wonderland ring to me yesterday.

First, there was his definition of protected speech. He said many of the whistleblowers are just not engaging in dissent. Well, I have a case study on that, of a woman who contacted our office. She had received help from Senator Levin's office, but the Special Counsel turned her down.

The Special Counsel explained to us that she had never engaged in dissent, that GAP was misusing the term "whistleblower" as a "shiboleth." But when we checked her file, it was clear that she was dissenting actively and repeatedly. She wrote a quarterly report that wasn't part of her job description specifically to dissent about problems in the Army library system. The officers were getting the extra copies of books that were supposed to be set aside for enlisted troops. The Special Counsel simply refused to recognize that whistleblowing existed.

Let's take the category of "indepth investigations." According to Mr. O'Connor, 22.5 percent of employees get them who contact his office. One gentleman in the room today would argue with that.

He had a Special Counsel investigation going for a long time, and he had to make 89 telephone calls before he could get through to talk to an investigator who told him he had closed the case.

Then, there is the example of a gentleman in Texas, Joseph Whitson, a civilian employee who would receive new rights under this bill. He had saved the military careers of Air Force personnel by testifying about tampering with drug testing. He was in charge of quality control for the urinalysis program at an air force base.

I think he had an "indepth investigation," because the case was open for 13 months and assigned to five different investigators. Let's see what happened.

First of all, the entirety of the correspondence with Mr. Whitson was a form letter acknowledging his complaint and a form letter closing it out.

Second, after obtaining voluminous documentation from him, the Special Counsel reneged on a promise to speak with witnesses he referred to the OSC investigator. In fact, these witnesses are still teasing him that there is no Special Counsel, kind of like whether there is a Santa Claus.

Third, the Special Counsel investigators broke three appointments to interview Mr. Whitson. Last August, Mr. Whitson came to Washington, DC to speak to the Special Counsel. The investigator again attempted to break the appointment after he arrived in the office. When he refused to go and she arrived, she obviously was ignorant of the documentation he submitted. Three weeks later, his case was closed.

Mr. O'Connor tells us that whistleblowers virtually never win in other forums if they lose before his office, so his judgement has been correct.

I would turn to the example of the antisemitic case, the religious discrimination case just decided. The attorney for the whistleblower for the victim in that case was Bridget Mugane, who testified this spring. She informed me that the Office of the Special Counsel turned her client down cold until she went to district court and won the case. Then they got on the bandwagon.

How about obvious disciplinary complaints that Mr. O'Conner has won. Couldn't the victims ever have been helped in any of those numerous successful prosecutions? There is the case of Mr. Eduardo Delgado, the southern California meat inspector who testified here last June.

Mr. Delgado was turned down by the Office of Special Counsel, but the EEOC did such an outstanding investigation that the agency just last week dropped the suspension against him.

Finally, there is the case of Mr. Vince Laubach who Mr. O'Connor attacked yesterday. He was pretty hot about the charges that were made yesterday, and he had us prepare a rebuttal last night. To summarize his points. in the in-depth investigation the Office of Special Counsel (1) took no notes in their initial interview; (2) failed to enforce an informal stay; (3) accepted agency assertions at face value; (4) refused repeatedly to meet with Mr. Laubach; (5) responded to inquiries from Senator Hatch by instructing the investigator to close the case in 5 days; (6) refused to recognize Mr. Laubach's dissent as valid because he wasn't the first one to raise similar issues—he was simply the first one to be effective—and (7) reopened the case this summer, called Mr. Laubach in supposedly for technical questions, and then engaged in what he described as the third degree on why he had been publicly critical of the Special Counsel for ignoring him before.

His attorney was there. His attorney was a gentleman who was formerly the president of the Federal Bar Association and a personnel chief for the Army. The Special Counsel refused to allow his attorney to participate in the deposition. The attorney protested that the Special Counsel's unprofessionalism was unprecedented in his over 40 years of government service.

Finally, yesterday Mr. O'Connor said that Mr. Laubach lost, although Mr. Laubach obtained complete relief through his grievance process and complete vindication on his charge through reports by the GAO, a congressional committee report and the U.S. District Court.

Mr. O'Connor told us yesterday that the law is the same, but he is doing a better job now. Nothing has changed in the law. Here, I think, we agree to an extent.

The law has not changed, but the Special Counsel interpretations of the law are all over the map, and they are contradictory.

The case of Bert Berube, the second whistleblower attacked yesterday, is illustrative. In a Federal Times editorial, "Disgrace at the GSA," the Federal Times described Mr. Berube's situation. He was decorated by GSA Administrator Carmen for blowing the whistle on the Carter administration and appointed to clean up the national capital region. As the Federal Times editorial stated: " Berube's fatal mistake was taking all this seriously." He was soon fired.

He went to the Office of Special Counsel, who not only turned him down but attacked him. They were doing this at the same time they were prosecuting one of their most celebrated disciplinary complaints, the *Harvey* case.

I think, to give you a clear illustration of the arbitrariness and need for a check on this office, we can compare the Special Counsel's treatment of Berube and Harvey.

In the *Berube* case, the protected activity was threatening to exercise appeal rights and threatening to go public. In the *Harvey* case, the protected activity was threats and intiatives to exercise appeal rights and go to the Special Counsel.

What was the stake for the public in Berube's whistleblowing? He disclosed asbestos throughout Federal buildings, threats of reliability to the White House power supply, and sanitation and building break down that could cause government buildings to be condemned if they were run by landlords.

In Mr. Harvey's case, it was basically a matter of alleged office mismanagement on a far smaller scale.

What was the differences in the *Berube* case and *Harvey* case? Mr. Berube blew the whistle before the personnel actions against him.

In the *Harvey* case a significant part of the alleged whistleblowing was after the proposed personnel actions were issued.

What about the Special Counsel's evaluation of evidence and management motives? In the Berube case, Mr. Carmen formally proposed termination in part because Mr. Berube had gone to the press. He later withdrew that particular change.

In the Harvey case, Mr. Harvey said he was upset, but he denied taking the personnel action because of the threatened exercise of protected activity.

What was the Special Counsel's conclusion? In the *Harvey* case, the Special Counsel stated that Mr. Gorsey, the complainant, was right to threaten to exercise his appeal rights. It was such a significant right that the Special Counsel engaged in its first litigation. In the *Berube* case, O'Connor characterized almost exactly the same conduct as the antithesis of protected conduct. He stated that Mr. Berube had attempted blackmail and had engaged in a shakedown.

We could go on and on in the comparisons on this. I think the point is made, however. The law means one thing if you are in the Special Counsel's favor. It means another if you are not in his favor. Whistleblowers deserve better from the Office of Special Counsel.

Madam Chairwoman, it is getting worse. Yesterday, Mr. O'Connor stated that actually his office has drastically improved the credibility and performance for employees through his tough standards. I would like to simply state that while the competence of the current Counsel staff is not in question, their ability to produce results for victims certainly is.

It is wrong that the previous Special Counsels were hopelessly ineffective. Under the first two Special Counsels the office regularly gained relief for whistleblowers through the stay provisions of the Civil Service Reform Act. They almost always won and didn't hesitate to use that authority. That part of the law has been dormant under Mr. O'Connor's prosecutorial emphasis.

Mr. O'Connor last year told the GAO that he would only litigate on behalf of whistleblowers if there was a 70 to 80 percent chance of winning. Now in his latest annual report the employee must be virtually certain to win before he will go to the Board. I cannot understand why he says that your proposal to change the law on burden-of-proof will not improve his chances here.

Third, he recently bought a lie detector for the Office of Special Counsel. When one of the Antioch students queried whether he used it on managers as well as complainants, the Public Relations Director simply laughed at us and said of course not with managers.

Finally, Mr. O'Connor described whistleblowers as similar to malcontents and vituperative dissidents. I was hoping he had gotten over that. He has shifted. Yesterday, he analogized the duties of the Office of Special Counsel's whistleblower representation to the ethical responsibilities of representing mental health patients. I simply don't think this man is on the same wavelength as the Grace Commission and this committee.

The third major question is whether this bill is practical? We think the answer is yes. Mr. O'Connor asserted that the legislation would create a legal services corporation for Federal employees. He may have been suffering from a few delusions of grandeur there. The bill only attempts to transform the Office of Special Counsel into a nonthreatening option for whistleblowers. Even a cursory review of Mr. O'Connor's analysis reveals that he was creating the ghosts he was chasing yesterday.

He stated there would be many problems because with the attorney/client relationship the Special Counsel effectively would be a slave to anyone who walked in the door.

As one who spends many hours trying to plan private attorneys for whistleblowers, I can assure Mr. O'Connor that is not the case. If he would be disciplined for turning down a nonmeritorious case, so should most of the Federal bar that is currently in private practice right now.

He stated the complainants shouldn't have access to their files. I think that is exactly our point. They are the victims of this philosophy, which is why their rights here must be written into the law. In other forums complainants have access to their files, and that is why we need the attorney/client relationship.

The final question I have is what do we need to do with this bill to effectively revive the first amendment in the bureaucracy? In my opinion, the bill is sound in many respects. It makes many major necessary improvements, and a lot of people will win their cases who couldn't today. Thousands less will be victimized by the Special Counsel.

Two specific improvements are necessary to do the job, however. The first is to improve the whistleblower disclosure channel. The goal for all of us is to get Federal employees who want to exercise their first amendment rights to do it so they can contribute to the public.

As the Board study pointed out last year, over 60 percent of Federal employees don't speak out because they simply don't think anything will happen. That figure is rising and it is more significant than the fear of reprisal. I think the experience of whistleblowers backed by the Special Counsel under the disclosure channel illustrates why they don't want to raise significant problems to their office; the reports that come back are flawed by conflicts of interest when agencies investigate themselves, and they typically turn out to be attacks on the whistleblowers, instead of investigations of their charges.

I would like to submit for the committee the reply we gave for Dr. Carl Telleen. He submitted a 77-page affidavit to the Special Counsel, affidavits and interview reports, from eight witnesses, who either repudiated the Secretary's report or supported Dr. Telleen when the Secretary said they opposed him, or whom the Secretary of Agriculture's agents refused to interview.

He gave 12 references to scientific studies, all of which were ignored by the Department of Agriculture when it concluded that the real problem was Dr. Telleen rather than fecal contamination of poultry that the public is consuming. They also all were ignored by the Office of Special Counsel, when OSC approved the report as reasonable.

Mrs. SCHROEDER. Without objection, we will be happy to put that in the record.

[The information is retained in subcommittee files.]

Mr. DEVINE. Thank you.

Mr. Edward Delgado indicated another problem. He couldn't see a copy of his charges when the Special Counsel referred them to the agency for investigation. Essentially, the Special Counsel said they were not his business. When the report came back all that Mr. Delgado was provided was a cursory letter from the Secretary attacking him. The Special Counsel failed to provide the exhibits that supported the attacks on Mr. Delgado. They sent us over to the IG. The IG said Mr. Delgado can get a copy of the report attacking him if he wants to pay $36 under the Freedom of Information Act. Whistleblowers reasonably can wonder—under those circumstances—why bother?

Madam Chairwoman, I appreciate that you have been patient with me covering a lot of territory this morning. I indulged myself, because I think these are serious points that should be made for the record.

I saved the point until now that to the whistleblowers we help at GAP is the most significant in their priorities. It is the second improvement that we think is necessary. That is to raise the status of Federal employees' constitutional rights to that of convicted felons by restoring the right of whistleblowers to file constitutional tort claims.

No right is so important for those with whom I have spoken. And, unfortunately, this bill could exacerbate the present problem of *Bush* v. *Lucas*. That is because the bill would provide employees a remedy at the Merit Systgems Protection Board where they at least have due process rights, if not a good faith forum.

We know you have not intended to have this result, or to have the *Bush* v. *Lucas* result either, because you filed a Friend of the Court brief challenging that decision. But, certainly, it is time to make this key problem better rather than exacerbate it or make it worse. In fact, here is one place where we would agree with the Office of Personnel Management witness who yesterday emphasized that the best deterrent to prohibitive personnel practices is individual liability through prosecution for engaging in reprisals.

If that is true, it doesn't make sense for the most effective deterrent to be monopolized by an official such as the Special Counsel, whose most charitable characterization of whistleblowers to date is to label them as informants.

As a result, those whom I help implore you in the area of constitutional rights as well, let whistleblowers defend themselves.

[The statement of Mr. Devine follows:]

TESTIMONY OF THOMAS DEVINE,
GOVERNMENT ACCOUNTABILITY PROJECT

Thank you for inviting my testimony on H. R. 4033, the Whistleblower Protection Act of 1986. You and Representative Horton have displayed bipartisan leadership to revive the First Amendment in the civil service system. Your initiative is none too soon.

Yesterday we had an ironic dose of negative leadership from the administration. It is ironic, because it would defeat President Reagan's repeated pledges to balance the budget in large part through whistleblowers who expose waste, fraud, and abuse. Yet Special Counsel William O'Connor -- who warns whistleblowers not to stick their heads up if they don't want them shot off -- advised you that he doesn't want to deepen the legal foxholes that are supposed to protect dissenters.

Then there was the "empty chair" for the Merit Systems Protection Board (MSPB). Although the MSPB may largely replace the Office of the Special Counsel under this bill as the forum to challenge reprisals, no member of the Board cared enough about freedom of speech to attend.

Finally, there was the curious spectacle of three administration representatives who claim that an estimated $18 million cost would be too expensive to curtail waste conservatively estimated at $25 billion. Even if their cost figures had been accurate, that flawed reasoning is penny wise and pound foolish to the point of being a caricature.

GAP's detailed analysis of the bill is contained in the attached January 29, 1986 public comments. In summary, this bill is a measurable improvement over the status quo. It contains provisions with enough practical benefits for employees that in some instances whistleblower cases would not definitionally be legal lost causes. It leaves enough independent obstacles to relief, however, that whistleblowers would still lag behind their pre-1978 legal status -- when they could challenge First Amendment violations in federal district court through suits for damages or personnel relief.

On the positive side, the bill's strong statement of principles ends the sophistic debate about the "role" of the Special Counsel -- which is firmly established as serving the employee's best interests through an attorney-client relationship. This modification eliminates the theoretical excuses upon which the current Special Counsel, William O'Connor, has relied to bypass his duties.

Second, the bill ends the Special Counsel's monopoly on stay requests to the MSPB, and on any MSPB challenge to certain prohibited personnel practices such as tranfers or loss of duties. This is particularly significant, since currently the employee can only turn to a hostile OSC whenever (s)he -- (1) seeks injunctive relief against any personnel action, or (2) fights back against reprisals where there is no independent appeal right for an MSPB hearing.

Third, the bill allows employees to appeal their cases to federal district court. This change is equally important, since currently employees have to appeal to the Federal Circuit. That forum is a no-win option -- even more hostile to federal employees than the Special Counsel or the MSPB.

Fourth, the bill increases the scope and strength of employee rights against prohibited personnel practices. Most significantly, the Special Counsel or the employee win by demonstrating "substantial evidence" of retaliation. Currently reprisals must be proved by a "preponderance of the evidence."

Unfortunately, so many roadblocks remain for whistleblowers that instead of providing enforceable rights the bill would leave them largely at the mercy of the Executive Branch's political agenda in general, and the Special Counsel's personal whim in particular. Although we have many specific suggestions, there are three conceptual weaknesses.

First, there is no judicial review of any decisions by the Special Counsel to decline requests from whistleblowers. As a result, there is no enforcement mechanism for the "new, improved" version of the OSC, and Special Counsels with perspectives like Messrs. Kozinski or O'Connor can ignore the new law as they have the old. Also, whistleblowers might have to lose before two hostile forums -- the OSC and the MSPB -- before a court conducts limited review. Contrary to Mr. O'Connor's concerns, it is impractical to establish OSC accountability through bar association disciplinary proceedings or malpractice suits for counterproductive legal representation. In our opinion, the only real solution is to specify unequivocally that a Special Counsel decision to turn down a whistleblower's request for help will have no probative legal significance. If they are formally irrelevant, the Special Counsel's attacks on whistleblowers will not be as damaging.

Second, the bill does not make any improvements in the OSC whistleblowing disclosure channel. In theory this mechanism provides a constructive option to accomplish change by allowing dissent within the bureaucracy. Because of the Special Counsel's bad faith, however, since 1981 its primary effect has been to help agencies defend the status quo by receiving advance warnings of challenges that dissidents might otherwise bring first to Congress or the press. We at GAP agree with our friends at the Coalition to Stop Government Waste that the best solution here is to cut through the conflict of interest inherent in agency self-investigations by establishing an arbitration forum to debate the validity of the whistleblower's dissent. Mr. Julie will discuss this issue more fully in his testimony.

Most significant, the Special Counsel still will have a monopoly on disciplinary complaints against the perpetrators of retaliation. Since the U.S. Supreme Court in Bush v. Lucas deprived most federal employees of the right to sue for constitutional torts, the manager who takes retaliatory action against whistleblowers has nothing to lose unless the Special Counsel decides to file a disciplinary complaint. In fact, by establishing universal coverage for employees to appeal any prohibited personnel practice to the MSPB, this bill would eliminate the last major opening for federal employees to file constitutional claims in court. In the D.C. Circuit employees generally can file constitutional suits if their only remedy is through the Special Counsel, because they have no due process rights at the OSC. But employees who can go to the MSPB for relief, in this bill, consistently are barred from filing constitutional actions. Unfortunately the MSPB has been just as hostile to whistleblowers as the Special Counsel. In effect, replacing the Special Counsel with the Board is like substituting one poison for another. But there's no antidote to the new poison. It will be difficult for federal employees to get excited about any whistleblower protection act that fails to lift them from the status of second class citizens who are deprived of the right to fight back through a lawsuit. Two solutions are necessary here -- 1) language restoring the right of public employees to file constitutional claims; and 2) establishment of judicial review for MSPB decisions analogous to EEOC rulings, where employees are always entitled to a de novo hearing on discrimination charges and to a de novo hearing on the entire personnel action if there is no prompt administrative decision.

Whistleblowers recognize that these changes will not be popular with federal managers. But your further leadership is necessary: the First Amendment has fallen far behind the equal opportunity laws. Surely freedom of speech is as important to our nation as freedom from discrimination.

COMMENTS OF GOVERNMENT ACCOUNTABILITY PROJECT ON WHISTLEBLOWER PROTECTION ACT OF 1986

JANUARY 29, 1986

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I. SUMMARY OF COMMENTS

The Whistleblower Protection Act introduced on January 22, 1986, by Representatives Schroeder and Horton and Senators Levin and Grassley, is a measurable improvement over the status quo. It contains provisions with enough practical benefits for employees that in some instances whistleblower cases would not definitionally be legal lost causes. It leaves enough independent obstacles to relief, however, that whistleblowers would remain far behind their pre-1978 legal status -- when they could challenge First Amendment violations in federal district court through suits for damages or personnel relief.

On the positive side, the bill's strong statement of principles ends the sophistic debate about the "role" of the Special Counsel -- which is firmly established as serving the employee's best interests through an attorney-client relationship. This modification eliminates the theoretical excuses upon which the current Special Counsel, William O'Connor, has relied to bypass his duties.

Second, the bill ends the Special Counsel's monopoly on stay requests to the MSPB, and on any MSPB challenge to certain prohibited personnel practices such as tranfers or loss of duties. This is particularly significant, since currently the employee can only turn to a hostile OSC whenever (s)he -- (1) seeks injunctive relief against any personnel action, or (2) fights back against reprisals where there is no independent appeal right for an MSPB hearing.

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Third, the Special Counsel still will have a monopoly on disciplinary complaints against the perpetrators of retaliation. Since the U.S. Supreme Court in Bush v. Lucas deprived most federal employees of the right to sue for constitutional torts, the manager who takes retaliatory action against whistleblowers has nothing to lose unless the Special Counsel decides to prosecute. It will be difficult for federal employees to get excited about any whistleblower protection act that fails to lift them from the status of second class citizens who are deprived of the right to fight back through a lawsuit.

II. UNSOLVED PROBLEMS

The primary three loopholes were summarized above, and will be explained below along with some more specific suggestions.

A. Absence of judicial review for OSC decisions

This is the fundamental weakness that could neutralize all the theoretical changes in OSC practices required by various provisions of the bill. In the area of prohibited personnel practices, there still is no judicial accountability for any of the OSC's actions unless, ironically, the Special Counsel prosecutes a manager for retaliation. Without a strong enforcement mechanism, for all practical purposes the bill will establish suggestions, not law. The status quo permits the OSC to help whistleblowers. Quite simply, the law has failed for the last few years because Messrs. Kozinski and O'Connor did not want to help whistleblowers. Without judicial review the law was no stronger than their biases.

The hole in whistleblower protection can be plugged by establishing an employee right to appeal OSC decisions in District Court. This would occur after the Special Counsel declined to assist the whistleblower, and presumably before the employee filed an independent complaint with the MSPB to challenge the personnel action under sections 1221-23. The court should conduct a de novo review of the complaint and remand it with orders for the Special Counsel to conduct an investigation that meets the Reform Act's minimum requirements, and/or to litigate on the whistleblower's behalf if the evidence submitted by the employee would be sufficient to defeat the employer's motion for summary judgment. (See also III. J., infra.)

This modification would solve the problem of accountability. If the OSC closes a case without investigation, the whistleblower could appeal for a court order to investigate, as required by law. If there is enough evidence to present a reasonable case and the OSC ignores it, the court could order the Special Counsel to defend the employee as required by law. There would finally be a way to keep the Special Counsel honest about these requirements.

The modification would have additional advantages as well. First, if the District Court supports the employee against the OSC, the decision would influence the MSPB. The Board's decisions unquestionably would be more balanced if they occurred after judicial guidance through *de novo* review of the record that had been available to the Special Counsel. Second, this approach most likely would discourage frivolous litigation by dissuading employees who fail in the preliminary stages before the Special Counsel and the District Court from dragging matters through a full-blown MSPB hearing.

B. Absence of meaningful opportunity for employee disciplinary suits

The criticisms above concern the ability of employees to defend themselves. For whistleblowers, an equally important factor is their ability to fight back through damage suits against the perpetrators of reprisals. This is significant to deter future prohibited personnel practices, as well as a matter of justice. Section 1222 allows individuals to seek actual and punitive damages against agencies that do not promptly comply with Board orders. It is unclear whether there are limits on the damage awards, equivalent to the $1,000 maximum fine in OSC disciplinary complaints. Although an improvement over the status quo, this provision will leave victims far short of their pre-Reform Act rights when they could file constitutional tort (*Bivens*) suits.

In *Bush v. Lucas*, the Supreme Court ruled that Congress intended the Civil Service Reform Act to serve as a comprehensive substitute for all previous personnel remedies, including constitutional tort actions. As a result, many whistleblowers believe that the primary effect of civil service reform has been to deprive them of the right to sue for violations of their constitutional rights. They claim that the reform instituted for their benefit left them second-class citizens compared to the rest of Americans who enjoy that right.

This major loophole can be plugged simply. Either in the bill or the legislative history, there should be an explicit declaration that in establishing an administrative remedy, Congress did not and does not intend to deprive employees of their right to sue for constitutional torts. There was never any such congressional consensus to deny avenues of relief in the past: bills to substitute Federal Tort Claims Act bureaucratic remedies for constitutional torts regularly were introduced without success, even after the Reform Act's passage. It is imperative that Congress close the loophole that the Supreme Court used phantom congressional intent to create.

A more modest alternative could plug the loophole and still give the MSPB first crack at merit system abusers: eliminate the Special Counsel's last monopoly and establish an independent right for employees to file disciplinary complaints for unlimited damages with the Board, whose decisions could be appealed by either party to district court for de novo review (as suggested above for prohibited personnel practice allegations). This would not be difficult to implement. Defensive and offensive causes of action could be combined in one hearing and appeal.

C. Absence of effective channel to pursue constructive dissent

The third premise for an effective whistleblower program is a meaningful channel to pursue dissent. After all, that was the point for incurring the risk of reprisal. Unfortunately, this bill does little to change the basic groundrules for an "agency self cleaning" mechanism in the Reform Act, which has been as ineffective as whistleblower protection. We cannot recall a single major reform initiated by public employees under 5 USC 1206(b), the current Civil Service Reform Act mechanism for whistleblowers. Whistleblowers (and citizens) have the potential to make significant and badly needed public policy contributions.

To illustrate the importance of this weakness, it is far more apt to chill dissent than inadequate protection against reprisal. That has been the conclusion of both MSPB federal employee surveys. In 1983 61% of respondents who witnessed misconduct kept silent, because they believed nothing would be done about it even if exposed. In 1980 the figure was 53%. By contrast, the 1983 survey reported that 37% of employees said they had kept silent due to fear of reprisal if they spoke out. In 1980 the figure was 20%. In short, it is clear that serious reform is needed both to protect whistleblowers and to help them make a difference.

1. The most basic proposed modification is to establish a unit at the General Accounting Office (GAO) to screen whistleblowing disclosures from anyone, citizen or government employee, who challenges the same misconduct already covered by the Reform Act (illegality, mismanagement, abuse of authority, gross waste or a substantial and specific danger to public health and safety). A federal employee would have the option of going either to the Special Counsel or to the GAO to blow the whistle.

Private citizens would be restricted to the GAO. This modification would help to achieve three advantages -- 1) eliminate the conflicts of interest inherent in agency self-investigations by strengthening the separation of powers; 2) provide the Special Counsel with necessary competition in oversight of whistleblowing disclosures; and 3) promote direct citizen involvement in challenging fraud, waste and abuse.

Perceived conflicts of interest due to short-sighted agency defensiveness represent a basic weakness in current law. Bureaucratic defensiveness is so consistent that it may be inherent. Routinely the result of OSC whistleblowing referrals is that in the ensuing report the agency makes the case for its own defense. As Vince Laubach explained, it's like assigning the Mafia to investigate organized crime. Good faith investigations and balanced reports are rare. The result is that routinely federal employees who have gone through the process do not believe their efforts made any difference.

Creating an independent GAO channel also would strengthen the separation of powers. Perhaps because it is an arm of Congress, GAO traditionally has offered a far more effective channel for agency reform than Inspectors General (the eventual home for most Special Counsel referrals). While sometimes disappointing, GAO investigations and reports routinely put analogous IG efforts to shame.

A related advantage to maintaining simultaneous disclosure channels through the GAO and the OSC is that it would establish healthy competition for the Special Counsel. It undoubtedly would improve the Special Counsel's review of initial disclosures and OSC evaluation of completed agency reports, if the Office stood a routine chance of being embarrassed through a parallel GAO action. Currently, the OSC has a monopoly on the formal channels. If whistleblowers are dissatisfied, their only options are to persuade the press to take up the cause, or to lobby for a congressional champion.

The final advantage for this modification is that it would give citizens a constructive option to challenge government misconduct. Citizen whistleblowers should not be excluded from the reform initiatives available to their government counterparts. To illustrate, the only OSC whistleblower referral that has had a significant impact concerned a corporate dissenter who exposed the NRC's failure to enforce the law at the Zimmer nuclear power plant. To obtain help from GAP, that employee convinced us that the problems he exposed were no less dangerous because he was a private citizen, rather than a public employee. We agreed that his dissent should be judged by the facts, and nothing else.

The ensuing OSC investigative order led to exposure of a comprehensive quality assurance breakdown at a plant that was 97% complete when the whistleblower filed his disclosure. The utility is now converting it to a coal-fired facility.

Ironically, the NRC made sure that the OSC precedent would not be repeated, even though its officials acknowledge that federal regulators had totally missed the grave safety problems brought forward by private citizens. The NRC obtained a Department of Justice ruling that then-Special Counsel Mary Eastwood had exceeded her authority by ordering an investigation on a citizen whistleblowing disclosure.

With a GAO forum, employees and citizen groups could file joint whistleblowing disclosures. This phenomenon in itself would be highly significant. Whistleblowers cannot be as effective if they are isolated from the citizens who benefit from their dissent.

The premises here -- citizen whistleblowing and GAO investigations -- are not new. Currently citizens can challenge misconduct through a GAO hotline. But hotlines are merely token, because they do not provide for followthrough other than referral for an agency self-investigation. In essence, the idea is to turn the hotline into something significant.

A weaker alternative would be for the Special Counsel to continue screening whistleblowing disclosures but to refer them to GAO for investigation, instead of to the target agency. This alternative is weaker, because it would not necessarily provide for citizen involvement and would still leave whistleblowers at the mercy of arbitrary OSC screening decisions. It would, however, eliminate the inherent conflicts of interest in the status quo and strengthen the separation of powers.

2. A small but essential modification is to establish the whistleblower's right to see what charges the Special Counsel supported and referred for agency investigation. It is hard to believe, but the Special Counsel routinely refuses to let whistleblowers see how the OSC has translated their allegations. There is nothing to be gained by keeping whistleblowers in the dark about the issues in a probe sparked by their dissent, usually at great personal risk.

Besides representing arrogance and paternalism, the Special Counsel's current approach fosters avoidable mistakes. The OSC only has a superficial grasp of the issues in dispute, and is vulnerable to misstating them before ordering the agency investigation. This in fact has occurred.

Again the problem can be solved with a minor change. At the end of section 1213(c) of the bill, the following addition should be inserted: "The Special Counsel shall send the employee a copy of the referral that is sent to the head of the agency." The legislative history should instruct the OSC to work with the whistleblower in drafting the issues found to have merit or to provide the whistleblower a copy to review before the allegations are sent to the head of the agency.

3. One reason agency self-investigations are so weak is the Special Counsel's lax review standards for completed reports. Agencies know that the Special Counsel will accept nearly anything submitted under section 1206(b)(3) as reasonable and complete -- the two evaluation standards specified by statute. Indeed, the OSC has explained that "reasonable" means any response at all that addresses the relevant issues. This refines a tradition begun in 1982, when the OSC defined "reasonable" as anything signed by the head of the agency. In both cases, procedural compliance improperly substitutes for an assessment of the facts as the standard to evaluate the agency report's reasonableness.

To illustrate, the recent report on USDA veterinarian Dr. Carl Telleen's issues was a classic smear of the whistleblower, instead of an investigation into his charges. Half a dozen witnesses whose testimony had been characterized by USDA as unequivocally hostile to Dr. Telleen submitted affidavits to GAP in protest of the misrepresentations. One witness, who had been Dr. Telleen's acting supervisor, was so upset that he refused to sign the USDA Inspector General's draft statement. The draft statement harshly attacked Dr. Telleen, whom the witness admired and strongly supported. Undaunted, the agency quoted from the unsigned statement. In three pages of a letter, the agency dismissed Dr. Telleen's professional dissent against weakening the sanitation standard for fecal contamination of poultry without prior scientific review. Although Dr. Telleen had submitted evidence from 14 studies that rejected USDA's analysis, the agency dismissed his dissent as a "personal viewpoint," did not mention the extensive scientific studies cited by Dr. Telleen and instead relied on an unpublished USDA study. Ironically, just a month earlier, in a major report the National Academy of Sciences leveled the same criticisms on a generic level that Dr. Telleen had raised from his specific research into fecal contamination. All of the rebuttal evidence was submitted to the Special Counsel, who was unfazed and without explanation notified Dr. Telleen that the OSC had approved the agency report as reasonable and complete.

It violates the OSC evaluation criteria for an agency report to support a conclusion through any other report published or not without fully disclosing its methodology. The published OSC evaluation criteria, which are enclosed, have not been enforced since Mr. Kozinski's tenure. The legislative history could revive these criteria, which had an effect on the quality of agency reports while Ms. Eastwood was Special Counsel.

Senator Leahy introduced the amendments that established the OSC whistleblowing channel in order to create an "agency self-cleaning mechanism" that would persuade employees to pursue reform by working through the system, instead of seeking change through "the glare of publicity." In practice, the result has been routine institutional coverups that gain credibility through the Special Counsel's nearly automatic endorsements.

A few modifications could provide legitimacy for the OSC evaluation process, if it is not replaced entirely by the GAO. The first is to insert a "strict compliance" standard for OSC review of agency reports into section 1213(f) of the bill. "Strict compliance" would apply to the OSC evaluation criterion that reports must contain all the information required by section 1213(d).

Second, the bill should require that the Special Counsel provide the agency report to the whistleblower and request his/her comments prior to the OSC findings on adequacy. Whistleblowers are the best experts either to criticize a bad faith effort, or to applaud legitimate reform. Unfortunately, the OSC estimates that it only requests whistleblower comments when it thinks they are necessary, or approximately 50% of the time. Under section 1213(g) of the bill, whistleblower review could decrease even more. That provision only provides for early transmittal of the report to the complainant if the OSC fails to approve it, which means almost never.

Third, the bill should require the Special Counsel to issue findings of fact and conclusions for its evaluations, just as if they were prohibited personnel practice complaints.

Finally, any provision for OSC judicial review should include its evaluation decisions on whistleblowing disclosures.

4. A minor but necessary change is to require that the Special Counsel place both the whistleblower's comments on the report and the Special Counsel's evaluation into the public file along with the report itself. Section 1213(j) requires the report to be placed on file, but nothing else. This would be reasonable, if the reports represented objective workproducts. Since in reality the reports generally are one side of the story in an adversary proceeding, the whistleblower's comments and the OSC evaluation should be added to provide balance. Again, this was a useful practice under Special Counsel Mary Eastwood.

5. Another minor repair, if agency self-investigations continue, would be for GAO to replace the Special Counsel as the agency to evaluate reports on OSC whistleblowing referrals. GAO has a much prouder investigative tradition than the OSC and could follow up automatically itself if the agency's report were not reasonable and complete. The evaluations could be published as part of GAO's annual review of civil service reform, an ongoing feature of the Act.

6. Finally, the bill needs to include a proviso that disclosures are eligible for whistleblowing referrals, whether or not the employee is the "first" to raise the issue. Routinely the OSC has ruled against the employee because the issue had been exposed previously. The relevant standard should be whether the problem has been solved, not whether the employee has a "scoop"

on the scandal. Otherwise, whistleblowers will be disqualified from working within the OSC system whenever the misconduct has been previously covered up.

D. Qualifications of the Special Counsel

The topics above represent the three most basic structural problems in the bill. But certain, more limited modifications could significantly improve employee due process rights. One seemingly innocuous change that could be a big help involves the qualifications for appointment to the MSPB or as Special Counsel. Section 1211(b) of the bill provides the following standard: "The Special Counsel shall be an individual who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of this position." Section 1201 provides a similar standard for Merit Systems Protection Board members.

Another criterion should be added to the list for MSPB and Special Counsel appointments -- "demonstrated commitment to merit system principles." This criterion would give employee groups a focus for nomination challenges, and Senators a handle during the advise and consent process. It might also persuade administrations not to nominate rookies such as Mr. Kozinski, who had no experience and therefore no track record with which to compare his 1981 pro-whistleblower confirmation testimony. If he had a record we could have called his rhetorical bluff in 1981 instead of having to wait until 1985 on another matter, after all of some 3,000 employees had been denied requested relief and close to half of the OSC staff resigned.

The backgrounds of the two Special Counsels sympathetic to employees would have qualified under this test. Mr. Patrick Swygert had served as General Counsel at the Civil Service Commission, where he helped to write the Reform Act. Predictably, he was sympathetic to its provisions. Ms. Mary Eastwood had long experience working on EEO cases for the Department of Justice before she came to the OSC as Mr. Swygert's deputy.

Confirmation challenges to Special Counsel or MSPB appointments are not a lost cause by any means. In 1981 whistleblower supporters and Senator Hatch stopped the nomination of Thomas Henderson to be Special Counsel, because of Mr. Henderson's weak record handling criminal whistleblower cases while he served as chief of the Department of Justice Public Integrity Section. With Mr. O'Connor's appointment up in June, whistleblowers will need strong criteria against which to measure the next nominee's record. If the third ringer in a row is selected as Special Counsel, it may be three strikes for the Office.

E. Controls on the quality of OSC investigations

Although the current Reform Act states that the Special Counsel "shall" investigate all prohibited personnel practice allegations, in fact the OSC only interviews witnesses in less than 10% of the cases. The most common complaint that GAP receives from whistleblowers is that the Special Counsel refused to talk with their witnesses. Quite simply, there is no accountability at the Office for the quality of investigations.

A few case studies illustrate the problem. Significantly, the following examples represent the Special Counsel's more ambitious efforts -- these employees did better than the other 90% of complainants. For example, after interviewing Bert Berube, Mr. O'Connor's "investigation" consisted of a nine minute telephone call with General Services Administration chief Gerald Carmen, whose denials of bad faith were accepted at face value by O'Connor.

In the Laubach case, the Special Counsel refused to interview the key witnesses. For those who were interviewed, the OSC did not check the accuracy of draft statements from some witnesses until after deciding to close the case. (At least one witness complained that the draft was inaccurate.) After a spate of bad publicity, the OSC reopened the Laubach investigation. But instead of pursuing the alleged reprisals in the transcribed deposition, the OSC attorneys pressured Laubach to explain why he was criticizing Mr. O'Connor. The OSC attorneys refused to receive evidence proferred by Laubach on prohibited personnel practice, and refused to enter the objections of Laubach's attorney on the record. Laubach and his attorney eventually left in disgust. The attorney, Conrad Philos, currently is a professor of law at George Mason University Law School. He formerly served as Chief of Personnel for the U.S. Army and President of the Federal Bar Association. He stated that the Special Counsel's unprofessionalism was unprecedented in his 45 years of government service.

The experience of USDA meat inspector Eduardo Delgado also is informative. After interviewing Delgado for three days, the Special Counsel declined to request an MSPB stay. An OSC attorney later explained to me that Delgado had presented "too much evidence." While there certainly was enough to justify a stay under 5 USC 1208(a), the attorney asserted that it would be impossible to get management's side of the story in the 15 days before the Office would have to seek an extension of the stay under section 1208(b). Instead, the Special Counsel promised to conduct a long-term investigation. That was in May. The OSC investigator has had a few conversations with Delgado in the last seven months, basically to reiterate information previously supplied. Otherwise, Delgado has not received any personnel assistance. In the meantime, he filed an EEO complaint on the same personnel action. By contrast, the EEOC investigator promptly talked with the witnesses suggested by Delgado and has completed a thorough investigation. USDA management has contacted Delgado to seek a settlement.

Over time OSC investigative tactics may become more ominous for whistleblowers who request help. The Office recently purchased a polygraph machine. It is only being used to check the veracity of complainants and their supporting witnesses. When a GAP representative asked if the lie detector is used to test the veracity of management testimony, the OSC representative laughed and answered "No."

It may be useful to seek guidance here from those who run firms that contract regularly with government agencies to conduct EEO investigations. The firms generally have solid reputations and in my experience have been more professional than their government counterparts. It is clear that guidance is necessary here, however: OSC "investigations" bear little or no resemblance to the normal definition of the concept.

One principle that should be established is a prohibition on discriminatory tactics during OSC investigations. For example, if the OSC grills a complainant for hours under oath and then requests that he or she take a lie detector test, the same request should be made of management witnesses -- who currently can expect to take care of problems in a phone call by denying any bad faith in connection with an alleged reprisal.

III. POSITIVE DEVELOPMENTS

It is worth listing the positive aspects of this bill. There will be enough pressure to weaken whatever is proposed that it is important to identify improvements promising to have a real impact. They should be fiercely defended, and further refined in some instances.

A. Reestablishing the duty to help. Sections 2(b), 1212(a).

The Findings and Purposes section specifies that the mission of the OSC is to protect employees. The structure to establish this duty is the attorney-client relationship, which the bill mandates between the OSC and individual employees. This approach effectively ends the dispute about the Special Counsel's duty, but it will not necessarily change the prejudices of Mr. O'Connor or his assistants. Since employees presumably no longer would have an outside lawyer, the result could be equivalent to assigning the fox to pursue the hens' best interests. Currently federal employees need lawyers to protect them from the Special Counsel.

In our opinion, two modifications should help eliminate the risks for whistleblowers here and keep the advantage of clarifying a formal OSC legal duty to employees. First, add a sentence at the end of the attorney-client provision, sec.

(2)(b)(3), to read as follows: "The Special Counsel shall not take any action which such employees determine is contrary to their best interests." The legislative history should explain that the prohibition against acting without the employee's consent extends from receipt of the request for assistance and continues after the case is closed. This addition would establish that the federal employee client has the same rights with the Special Counsel as any other client with a private attorney.

This change would prevent the current OSC practice of turning closed-case files into dossiers. In at least one case when a whistleblower subsequently applied for a new job after being turned down by the Special Counsel, an OSC staffer used the file to identify the employee as a troublemaker to Office of Personnel Management investigators and to pass along false agency charges that she had leaked information to Congress and the press.

This language also would preclude the OSC from turning down the whistleblower's request for help (on jurisdictional grounds, for example) and then warning the agency about the employee. The attorney-client duty would be established from the beginning of communications.

Similarly, this modification will prevent the Special Counsel from gratuitously issuing public attacks against whistleblowers. To illustrate, the change would prevent incidents such as the OSC's advance media briefings and Mr. O'Connor's congressional testimony criticizing GSA whistleblower Bert Berube. According to O'Connor, Berube had engaged in a "shakedown" by threatening to exercise his appeal rights. Under 5 USC 2302(b)(9), the Special Counsel is required to protect employees' right to appeal personnel actions. With friends like this....

At oversight hearings, when Mr. O'Connor analogizes whistleblowers to bag ladies, he is merely in bad taste. But he should not be permitted to publicly attack those employees who unwittingly seek his help. It will take careful drafting to provide federal employees adequate protection from the Special Counsel, unless the OSC perspective changes.

The second suggested change is to add a provision in the statute that will allow the employee to retain private counsel to assist the OSC. The private counsel should receive attorney fees whenever the OSC prevails. There are two benefits here. First, the employee will have another lawyer to help keep the Special Counsel honest. It is dangerous to leave whistleblowers at the mercy of the OSC, legal duty or no legal duty. Second, the OSC is going to need all the help it can get. In the old model the Special Counsel's relation to the Board was like a U.S. Attorney to a court. As a result, the OSC had wide prosecutorial discretion to trim its caseload. If the bill works, however, the OSC will be more like a legal services organization for federal employees. Its budgetary needs could be prohibitive, unless there is a cooperative relationship with the private bar.

B. Eliminating the OSC monopoly. Sections 1221-23.

These provisions allow the employee to completely bypass the Special Counsel and appeal any alleged prohibited personnel practice to the MSPB. Formerly, employees could only appeal reprisals that involved dismissal or suspensions of more than 14 days. For transfers to bureaucratic Siberia, loss of duties, or similar reprisals, they had the choice of the Special Counsel or nothing. If the MSPB were an administrative forum in which whistleblowers could place their hopes, this provision would be a significant improvement. Since it is not, in isolation this change will have minimal effect.

C. Establishing judicial review in district court. Section 1221(f).

This section provides a definite, significant improvement, since the Federal Circuit is a hostile forum for employee rights. One minor change may be necessary. A clause should be added to the end of section 1221(f) specifying further review in the U.S. Court of Appeals for the District of Columbia or the federal court of appeals in which the individual lives.

While section 1221(f) is necessary, it is not sufficient to compensate for a bankrupt administrative process. Unwary employees who exhaust their administrative remedies will have lost at two hostile forums before the district court conducts limited review under the abuse of discretion and arbitrary and capricious standards.

This subsection could establish an independently credible remedy, however, without resorting to intermediate review of OSC decisions as suggested above. (Supra, at 2-3). The EEO model provides the answer: permit the employee to obtain de novo review by the district court of prohibited personnel practice allegations, and to go directly to court if the Board does not issue a decision within 120 days. The latter proviso is necessary due to fiascos such as the Berube appeal, which has been pending for nearly a year despite the Board's time limits.

This approach has been practical for discrimination cases, and employees have had a chance to win EEO complaints. There is no single change that would do more to give whistleblowers a fighting chance than strengthening the judicial review portion of this bill.

D. Separating the Special Counsel from the MSPB. Section 6.

Formally severing all ties between the two is necessary because of problems in the past and recent symptoms of collusion between the two offices. To illustrate how cozy things may have become, specific evidence surfaced during the Kozinski judicial nomination of illegal, off-the-books fund transfers between the OSC and the Board. Although the information was disclosed too late and was too technical to be a factor in the Kozinksi nomination, potentially it is directly relevant as support for this subsection. The facts should be investigated by GAO now for a more informed debate on the bill later.

E. Simplifying and strengthening "stays". Section 1205.

This subsection permits the employee to seek an MSPB stay, which formerly was the Special Counsel's sole option. Instead of the current system of 15 day, 30 day and long terms stays, the challenged personnel action is lifted for a 60 day injunction, to be extended until the Board issues a decision. Employees would have a stricter burden of proof ("substantial likelihood of success") than the Special Counsel ("substantial evidence").

This is a better structure than the current patchwork approach and strengthens the whistleblower's independence by eliminating another OSC monopoly. The legal burdens of proof for the Special Counsel and for employees seeking stays independently of the OSC are both appropriate and have well-developed legal definitions.

F. Reducing the burden of proof for corrective action. Sections 1214(b)(3) and 1221(d).

Instead of having to present a "preponderance of the evidence" as currently, under this change the employee wins when the whistleblowing reprisal charges are supported by "substantial evidence." This is an excellent improvement and represents exactly what is needed -- strengthening the rules that define the right to dissent. Unfortunately, since most Board decisions take an overkill approach to rejecting whistleblower complaints, the distinction may not have as much impact as it should. It would be an important standard for judicial review, however, and someday could be significant for the MSPB.

The legislative history should emphasize the policy bases for this switch -- 1) dissatisfaction with previous MSPB decisions, and 2) a goal to eliminate prohibited personnel practices by overturning personnel actions when the evidence raises a serious question of merit system violation(s).

G. Expanding the definition of prohibited personnel practice. Section 4.

Under this provision it would be protected conduct to assist a prohibited personnel practice victim, to cooperate with Inspectors General and the OSC, and to refuse orders to break the law. These are fundamental improvements in the definition of employee rights, particularly the last change.

Several loopholes similar to those listed in section 4 also should be plugged. For example, due to OSC inconsistencies, there still is considerable confusion whether agencies can gag employees from dissenting outside the chain of command. Similarly, the Special Counsel on numerous occasions has refused to help whistleblowers because they were not the "first" to raise an issue -- the disclosure was not "new." Section 2302(b)(8)(A) should be modified to explicitly protect significant disclosures permitted by statute and supported by a reasonable belief, whether the dissennt is "initial or repetitive; written or oral; inside or outside the chain of command; public or within the agency." Section 2302(b)(8) and (9) should be amended to protect employees for "expression of intent" to engage in protected activity. This would preclude repeat performances of the Berube incident, where the Special Counsel held that an employee can be fired for "threatening" to exercise appeal rights. (Supra, at 12-13).

The definitions of personnel action also should include orders, diagnoses, examinations, and decisions on physical disability, psychiatric disability, and worker's compensation. This provision would then cover instances such as abuse of psychiatric fitness for duty examinations, or conversely an agency's failure to process disability or compensation claims of whistleblowers. Harassment in this area is one of the most personal and pernicious forms of reprisal.

H. Expanding accountability for disciplinary actions. Section 1215(b).

This improvement expands accountability by holding military officers, Presidential appointees, and "indirect" (i.e., contractor) officials liable for prohibited personnel practices. The provision should be clarified to provide corresponding protection to contract employees. With that modification, the bill would establish legal rights for corporate employees who challenge military procurement fraud.

Two other supplements would further strengthen the provision. First, "former" government officials should be subject to the Board's jurisdiction. Former Special Counsel Mary Eastwood was prevented from filing disciplinary complaints when managers resigned from the government. Second, discipline should be imposed automatically whenever -- 1) the Board finds that an official has committed a new prohibited personnel practice, after any such earlier finding against the same official; or 2) the Board finds that an employee has been victimized by a new prohibited personnel practice, after any such earlier finding on behalf of that employee. This modification would increase deterrence against repeat violations.

As a cautionary note, this subsection would be counterproductive if the Bush v. Lucas bar to constitutional tort suits remains. Currently, for example, presidential appointees might be an exception to Bush, because there is no provision in the Reform Act for the Board to subject them to disciplinary proceedings. There is no question that whistleblowers would rather have the right to sue Presidential appointees for retaliation than to sacrifice it for a forum monopolized by the MSPB and the Special Counsel.

I. Mandatory OSC duty to litigate after finding reprisal. Section 1214(b).

This subsection eliminates the Special Counsel's current discretion whether to seek corrective action or a stay after finding a prohibited personnel practice. The OSC will have to do both. While the OSC can easily circumvent the duty through negative findings of fact, at least the change reinforces the nature of the Special Counsel's mission. It would be particularly significant if there were good faith leadership at the Office.

Another way that the OSC predictably will circumvent this provision is by continuing its current functional definition for "reasonable grounds to believe" a reprisal exists. As translated in this year's OSC Annual Report, at 2, this standard means "virtual certainty that the evidence provides sufficient facts to insure success..." (emphasis added). This definition essentially renders the OSC superfluous under the bill. Once the OSC's monopoly is eliminated, an employee whose case is "virtually certain" of success would have no trouble finding outstanding private counsel to take it on a contingency fee basis.

For the Special Counsel to represent a meaningful option for assistance, the Office must be required to litigate whenever there is a reasonable chance of success. A realistic interpretation of the "reasonable grounds to believe" standard must be added to the statute or emphasized in the legislative history. One suggestion is "evidence sufficient to overcome a motion for summary judgment." Without strict guidance here, the OSC will be free to continue indefinitely its track record of the last four years: no corrective action complaints. In fact, it would be predictable. "Virtual certainties" in litigation have the same basis in reality as miracles. Maybe they exist, but God help anyone who has to count on them.

This mandatory duty to litigate all complaints with merit increases the need for participation of the private bar in whistleblower cases. Otherwise, with a fixed budget the Special Counsel will have to construct a "fiscal" definition of meritorious cases; rights will be evaluated according to the OSC's ability to afford litigation. In fact, the OSC already rationalizes the "virtual certainty" criterion by explaining that "[e]xpenditures of limited OSC funds cannot be authorized for filing complaints against federal employees and officials unless" [that guarantee exists of success]. Id. Significantly, this bill does not increase the Special Counsel's budget, and the Office spends nearly $5 million per year currently not to help federal employees. How much would it cost if the Special Counsel really defended those who were deserving? However, if private attorneys were persuaded that the case would earn attorney fees at the end, as co-counsel they could reduce the Special Counsel's costs significantly.

J. OSC findings of fact and reasons. Section 1214(a)(2).

By requiring findings of fact and reasons for the OSC decision, this improvement could introduce sorely-needed professionalism to communications from the Special Counsel to whistleblowers. This provision should be supplemented to explicitly state that the complainant is entitled to a copy of the Special Counsel's investigative file in his or her case, with necessary deletions to comply with the Privacy Act. Amazingly, the Special Counsel frequently refuses to let whistleblowers have their investigative file, even when in some cases the files have contained valuable evidence for the employees' independent appeals to the MSPB.

K. Reducing the option for phony settlements. Section 1214(b)(2)(B).

One of the OSC practices that has left whistleblowers the most bitter is settlements approved after negotiations between the Special Counsel and the agency, without the participation and often over the objection of the employee. Frequenntly the results of the settlement largely ignore the victim's plight and basically involve a promise not to repeat the alleged agency misconduct. The Special Counsel then declares "victory" and closes the case, although the whistleblower's career may be over.

Proposed subsection 1214(b)(2)(B) goes a long way toward eliminating this cynical practice. The OSC loses the power to unilaterally dismiss the reprisal charges. Instead, the OSC can now only petition the Board, and then only if the alleged prohibited personnel practice is reversed or cancelled. Promises "not to do it again" will no longer suffice. Even then, the Special Counsel must consult with the complainant and disclose whether the victim agrees that the retaliation has been terminated. Finally the individual has the right to file comments with the Board as well.

While this proposal is a significant improvement over the status quo, it would be simpler to establish a system similar to any other attorney-client privilege: the client must approve the attorney's proposed settlement. At a minimum, the whistleblower should be able to appeal to court any settlement that has been imposed by the OSC and approved by the Board over his or her objections.

L. Strengthening attorney fee awards. Section 1221(e) and (f)(3).

The former provision requires attorney fees and costs "where" the Board finds a prohibited personnel practice. That is a significant improvement from the current "in the interest of justice" standard. Section 1221(f)(3) states that the district court "may" award attorney fees when it overrules a Board decision adverse to the employee.

Since the Board has rarely found a prohibited personnel practice, this change alone will not make whistleblower cases a good risk for contingency legal fee arrangements, which often is all the employee can offer. The attorney fee guarantee should be added for cases in which the employee successfully appeals an MSPB finding to court. The employee is no less deserving because the courts have to overrule erroneous MSPB decisions. Otherwise, attorneys may well perceive that even with strong cases they will lose before the Board, win in court, and not get paid.

M. 1989 sunset provision. Section 5(a)(2).

The Special Counsel's reprieve extends to September 30, 1989, when its existence must be renewed. During the interim, or if it is impossible to get a consensus behind this approach, we suggest you study the Department of Labor model to protect environmental whistleblowers. That approach protects employees against any "discrimination" for protected activity, which cuts through the "listed personnel action" barrier for establishing MSPB jurisdiction on a harassment challenge. Complaints are investigated by the DOL's Wage and Hour Division, with de novo review before an Administrative Law Judge. The DOL has a bipartisan tradition of sensitivity to remedial statutes for employee rights, and a respectable body of law pertaining to whistleblower retaliation is developing at the Department of Labor.

Mrs. SCHROEDER. Well, Mr. Devine, I certainly thank you for your patience of sitting through the hearing yesterday and responding today. A lot of what you said was exactly what I wanted to say. It was a very frustrating day for me as I listened to testimony which I thought was a tad self-serving, and a little sanctimonious. So, I appreciate your pointing out a lot of that.

On the *Brush* v. *Lucas*, you are right, I did file a Friend of the Court brief, and I also think the court was wrong in that. This bill is not intended in any way, shape, or form to foreclose private rights of action by employees. I don't know if we need language or what, but certainly it is not the Chair's intent nor anyone else's intent, I don't believe, to stop that. So, we will figure out what we can possibly do to make sure that that is clear if you don't feel it is clear.

Yesterday Mr. O'Connor said that they have never been contradicted by other factfinders. You have now laid out very well that that is not the case. So, the record will be excellent on that point. And it will be very helpful.

Explain why it would be a good idea to allow Federal workers the right to sue individual supervisors.

Mr. **Devine**. That was the right Federal employees had to file constitutional tort suits or for equitable relief, injunctive relief. It is the right that all Americans have when their constitutional rights are violated. We agree with OPM that individual accountability has to be the foundation of a system of laws.

Mrs. **Schroeder**. I wonder if the administration really focused on that.

Mr. **Devine**. I was wondering about that myself.

Mrs. **Schroeder**. We both have the same question, I guess.

Mr. **Devine**. Yes.

Mrs. **Schroeder**. One of the things we heard over and over again yesterday, too, was that there was no evidence that reprisals for whistleblowing was a problem.

Mr. **Devine**. That is correct.

Mrs. **Schroeder**. Obviously, you are saying that that is not the case. Not from your experience?

Mr. **Devine**. Well, reprisals for whistleblowing keep me at my notepad about 70 to 80 hours a week. My whole life is something that doesn't exist if Mr. O'Connor is right.

Every day I see the case studies and the living histories disproving the point of view that he and OPM and the Department of Justice witnesses purported to present yesterday. I just cannot accept that government officials can come in and rewrite history as it is occurring. Their testimony had almost no contact with the reality of dissent in the bureaucracy.

Mrs. **Schroeder**. Both OPM and Special Counsel, as I remember it, said that the best protection against retaliation was to prosecute those who committed the prohibited personnel practice. I have always felt that the best protection is first to restore the victim, then you worry about the other things.

I think one of the biggest hangups about being a whistleblower is if you are going to pay for a long period of time of not being employed that really does impede it.

What would you say?

Mr. **Devine**. Madam Chairwoman, I would have to give two responses. Those whom I represent, I think as much as anything, would rather be able to fight back, and there is a realistic basis for their desire. They know as well as any of us do that it is very difficult to go home once you are identified as a public dissenter. In lawsuits for damages, they get some possibility of financial security as well as accountability.

The other half of my answer, however, is that in my routine strategies I agree with you, I would rather get those employees back on the job contributing to the public, drawing a paycheck and feeling like they are working for the public good rather than just engaged in a fight with their bosses.

That is why I have been so disappointed that the Special Counsel has allowed the stay provision of the Reform Act to become almost a thing of the past. It was very effective under Mr. Swygert and Ms. Eastwood. I think it is an important improvement in your bill to give employees the right to file for their own injunctive relief.

The problem is they can only do it before the Merit Board. Their chances are much better if they get into court like all other Americans.

Mrs. **Schroeder.** I think that is true. I always figured that a mortgage payment hanging over your head must force you to think about what to do.

Mr. **Devine.** My bank account would collapse if I were fired from GAP. I don't know what I would do if I had to blow the whistle there.

Mrs. **Schroeder.** That is very real. I understand wanting those rights but it is a difficult balance which gets me to the final question. What we are trying to do is obviously shift the Office of Special Counsel to make it very clearly a representative of whistleblowers, and we have the head of it saying he doesn't want to do that.

As long as he remains the head of it, he probably isn't going to. He'll just nitpick as much as he can about the law and find every reason to not comply with it.

Since we cannot change who will be head of that Agency, only the President can under the Constitution, any additonal ideas that you have will be helpful. If you can put your hat on and think like Mr. O'Connor thinks—which may be hard—we would appreciate having that information.

I fear that this bill could get sidetracked very rapidly and once again the intent be thwarted.

Mr. **Devine.** I think there are probably two points that are less fundamental but may in a bread and butter sense be the most significant.

One is preventing the Office of Special Counsel from distributing the information in a whistleblower's case file without his or her consent. One of Mr. O'Connor's gripes yesterday was that with an attorney-client relationship the Special Counsel cannot divulge confidential information in a way that would be detrimental to the client's best interest.

That is right, and it is necessary because of what they are doing now. The closed case files of whistleblowers are used by the Special Counsel to testify against those who seek future Federal jobs. After they went to the Office of Special Counsel, didn't get any help, gave up on their first job, and sought a new career in another Government agency, the Office of Personnel Management came for background checks. In one example, the OSC staffer pulled out the case file and in effect warned; "I don't know if I would trust this person. She was fired for being suspected of leaking documents to Congress and the press."

I can understand why Mr. O'Connor is complaining about that, but I think that gets to the second point: It would be a significant improvement if this bill effectively curtailed the Special Counsel from hurting the people who come to that office for assistance. If we could just get back to even, a lot fewer people would be hurt than under the present system. This bill largely is intended to allow that and it gives whistleblowers a way to bypass the office.

You cannot legislate an intention to enforce the law, but I think you can effectively prevent the Special Counsel from damaging whistleblowers. Another way that could be done is by specifying that if the Special Counsel refuses to litigate on behalf of a complainant, a whistleblower, that the decision will have no probative legal value. Therefore by defining the Special Counsel's turndowns as legally irrelevant, you will minimize the damage the office can create.

Most of the folks that I represent, every one of them who ever talked to me, say they prefer the office to be abolished. I think you are taking a very balanced approach for all points of view by giving them another chance, and you are doing it in a way that would largely eliminate the threat they currently represent.

Mrs. **SCHROEDER**. There is one thing we have done and I think you addressed it very well in your testimony and I agree totally with you. The Special Counsel is wrong in his view that by making his office the legal representative they must represent everybody that walks in the door. As you well pointed out, if that were so, the whole Federal bar would be subject to the same cause of action. What we have done is that if the Special Counsel takes a case and then later on turns on the client or uses it in a negative way, the client would have some kind of action against Special Counsel for doing it.

Mr. **DEVINE**. That is correct. I think it is very important that the Special Counsel realizes there will be accountability for malpractice or disserving a client's best interest. That would be an extremely significant improvement to the law.

Mrs. **SCHROEDER**. I have a feeling from listening to his testimony yesterday, he probably realized that—the fun and games may be over.

Mr. **DEVINE**. I don't think you will ever get officials with perspectives like Mr. Kozinski and Mr. O'Connor to try to help whistleblowers, but they are smart enough to know they don't want their attacks on whistleblowers to obstruct their own careers. By making them liable for their actions, you may accomplish that goal.

Mrs. **SCHROEDER**. Well, thank you very much, Mr. Devine. You have been very helpful.

Mr. **DEVINE**. Thank you.

Mrs. **SCHROEDER**. Our next witness is Mr. Julie who is the president of the Coalition to Stop Government Waste. We are pleased to have you.

STATEMENT OF LOEBE JULIE, PRESIDENT, COALITION TO STOP GOVERNMENT WASTE

Mr. **JULIE**. Thank you, Madam Chairwoman, let me thank you for inviting me to testimony on this important issue.

I am Loebe Julie, president of the Coalition to Stop Government Waste, a 100,000 member nonprofit, national, grassroots organization that exposes waste in the Federal Government and supports legislation to stop ongoing waste, fraud and abuse of tax dollars.

In the interest of clarify, let me point out that for the past 3 years I have been the head of a very active organization called the Committee Against Government Waste. Please do not confuse our committee with the newly organized Grace Committee by the same name.

I am here to testify on H.R.4033, the Whistleblower Protection Act of 1986. I will be happy to pledge the active support of my organization for its quick passage, but only if certain essential provisions to protect the constitutional and legal rights of Federal employees are added to the language of the bill.

Helping whistleblowers is one of the major objectives of my organization. I strongly believe that the whistleblower is the first line of defense in the war on Government waste and corruption. If the Government can continue to silence whistleblowers by intimidation or job loss, who else will expose the criminal waste of our tax dollars?

Because of the concern and the admiration that we have for whistleblowers, our coalition established the Whistleblower Patriot Award. The 1985 awards, which include a $1,000 cash gift, went to George Spanton for blowing the whistle on the spare parts scandal and to Vince Laubach for blowing the whistle on the Department of Interior's failure to collect penalties and fines for strip mining violations. We are happy that shortly after these public awards both Spanton and Laubach were officially vindicated.

It is common knowledge that the best defense is a good offense. We believe that it is impossible to defend whistleblowers adequately without also drawing public attention to and attacking those in Government who have hampered, obstructed and persecuted whistleblowers. For that reason, we created an award called the anti-Whistleblower Award. The two unchallenged winners of the anti-Whistleblower Award in 1985 were the Merit Systems Protection Board's Office of the Special Counsel and the General Accounting Office's Bid Protest Division.

You will not be surprised to learn that the anti-Whistleblower Awards were not graciously accepted and are still waiting to be claimed at our Capitol Hill office.

To assist those whistleblowers who seek guidance as to how to blow the whistle on waste, fraud or abuse, the coalition has established the whistleblower hotline.

In addition to Federal employees, who are concerned about and report government abuses, our coalition's interest includes thousands of whistleblowers in the private business sector who try to report abuses in the Government procurement process. We believe that some of our proposals to protect the private sector whistleblowers are directly applicable to Federal employee whistleblowers.

Let me describe private business sector whistleblowing briefly. If a member of the business community believes that a government contract bid is unfairly anticompetitive or otherwise illegal, he has the right to blow the whistle, protest, before the General Accounting Office's Bid Protest Division.

Unfortunately, the Bid Protest Division almost invariably supports the agency and hardly ever rules in favor of the protest. Doesn't that sound disturbingly familiar?

Obviously, what was urgently needed was a less biased forum for the private sector whistleblowers; a forum committed to enforcement of Federal laws mandating full, fair and open competition and efficient and economical contracting. We began to campaign for such reform in 1985.

Legislation introduced 2 weeks ago, called the Procurement Safeguard Act, provides for the better forum. Under the new legislation an estimated 3,000 private sector whistleblowers per year have an alternative; to go before a substantially better and fairer forum—

the GSA Board of Contract Appeals—instead of the Bid Protest Division of the General Accounting Office.

I have attached a copy of that Act to my statement.

For essentially the samed reasons that we put forward the Procurement Safeguard Act, our coalition will strongly support your proposed legislation if the necessary language is added to make it a true whistleblower protection act.

The essence of that language is contained in the following three brief paragraphs:

> 1. Nothing in this legislation or the Civil Service Reform Act of 1978 shall abrogate or substitute for the rights of any Federal employee to file any constitutional claim in Federal district court for relief against individuals or agencies of the government.
>
> 2. The purpose of this bill shall be to reaffirm and strengthen the individual's First Amendment rights to freedom of expression on any matter not subject to government security classification.

Let me preface the third paragraph. All our efforts to guarantee Federal employers' rights in the courts are nullified by the universally acknowledged failure of the U.S. court system to dispense justice quickly, effectively, fairly and economically.

Today's experts on obtaining justice refer to something other than the courts. They refer to ADR, Alternate Dispute Resolution; in short, arbitration.

The best and fairest way to resolve disputes today is the ADR route. Our paragraph 3,therefore, says:

> A determination either by the Special Counsel or any Member of the Congress, that a whistleblower complaint has merit, shall suffice to trigger a non-binding arbitration proceeding, on the issues, using standard procedures of the American Arbitration Association.

Incorporating these three points in the language of the existing bill will give us the solid foundation for a whistleblower protection act that our coalition, and others, can and will strongly support.

Let me conclude by pointing out that whistleblowers need and deserve much more than just this foundation. Briefly, true whistleblower protection would encompass what I call the three "P's" of protection—privilege, punishment, and payment.

First, privilege: I refer here to the privileged immunity we normally extend to people in exchange for valuable information usually provided to prosecuting agencies. The price we gladly pay in exchange for such important information is to protect and immunize the source against any and every conceivable kind of reprisal. This immunity, which even extends to amnesty for wrongful behavior by the source, is a reasonable price to pay.

The Government whistleblower, who is generally the antithesis of a wrongdoer, needs and deserves immunity and amnesty in return for providing his information. The least we can do is shelter him for the entire period of the investigation and resolution of his case, plus a minimum period of 2 years thereafter.

Next, punishment: I still believe the best way to protect a whistleblower is not just to make him whole, but to punish his persecutor. There has always been a gross failure to punish the real wrongdoers in the system—not the whistleblowers, but those officials guilty of misfeasance, malfeasance, nonfeasance, waste, fraud or abuse. Such punishment is permitted under civil service rules.

For example, after my company, Julie Research Laboratories, successfully blew the whistle, a finding by the Inspector General of the Army led to the disciplinary transfer of 20 procurement employees of the Army. The punishment of choice to deter further abuses and to prevent reprisals against whistleblowers is transfer of the individuals guilty of abusive practices to other departments of the government.

Transfer is not as difficult to accomplish under civil service rules as discharge, demotion, or fine, and should be mandatory. The other available punishments, including prosecution of wrongdoers under title 18, section 001 of the U.S. Code, should be resorted to whenever possible.

Finally, payment: Perhaps the most successful whistleblower case history, from the standpoint of the taxpayer, government and whistleblower alike, is that of William Clinkscales of the General Services Administration. Clinkscales didn't expect payment but received it from President Reagan in the form of a promotion in pay, rank and responsibility.

From every point of view, promotion is clearly the reward of choice for successful whistleblowers and should be made mandatory. Additional forms of reward, whether lump sum payments or percentages of savings realized by the government, are desirable and can also should be used.

These three, then—privilege, punishment, payment—are what I referred to as the three "P's" of whistleblower protection. The Congress must some day soon put them in place. Only then will we have whistleblowers fully motivated, protected and rewarded. Only then will the American people, with the help of these honest, dedicated, courageous and patriotic employees we call whistleblowers, be able to curb the giant abuses of our giant bureaucracy.

We thank the subcommittee for its efforts in this critically important battle. We are fighting not only to protect the rights of worthy individuals, but to help them bring an end to agency abuses that weaken our armed forces and wastes tens of billions of badly needed tax dollars each year. I assure you of the full cooperation of our members in fighting to achieve these worthwhile goals.

Ms. SCHROEDER. Thank you very, very much, Mr. Julie.

I think it might be helpful if you told us how in the world you got into this business.

Mr. JULIE. I have been a whistleblower for many years, both as a Federal employee and in the private sector. I discovered our system didn't work to protect me. I inferred that something was needed to make it work. And I thought, in addition to those people in Congress, like yourselves, who are fighting on behalf of whistleblowers, what was needed was a grassroots organization to give you the support Congress needs.

Ms. SCHROEDER. That is remarkable.

Let me ask some more about your nonbinding arbitration. That sounds very appealing. And I agree with you that legal things have all gotten costly and drawn out.

How would you provide for payment?

Mr. JULIE. In a standard American arbitration proceeding, both parties pay a fee that is related to the size of the action, and those fees are perhaps 10 times smaller than the cost would be if you went to a court proceeding and paid lawyers. You can go pro se in an American arbitration proceeding so that that minimizes your legal costs. You eliminate a lot of duplicative deposition procedures that you go through in court.

It seems to me that the Federal employee would be in a better position to pay arbitration fees than he is in a position to pay standard legal fees.

Ms. SCHROEDER. And you would trust Members of Congress to decide who was the true whistleblower? I have never seen such trust. I love it.

Mr. JULIE. I think Members of Congress have the time that the Office of Special Counsel would not have to examine the issues brought to them by a whistleblower, and to determine whether the whistleblower has made what is called a prima facie case. That should be enough to open the matter to an arbitration proceeding. And I should think a Member of Congress would do that.

Ms. SCHROEDER. So, you would in essence make us ombudsmen of sorts on that?

Mr. JULIE. Yes; as I believe you are normally, anyway.

Ms. SCHROEDER. We are, but we have had to do it through the media. We have never had that direct access to the trigger of something happening.

Mr. JULIE. The arbitration proceeding is excellent. I have been through many court proceedings; they are quite deficient. I was in one arbitration proceeding, and since you have the option of choosing from a panel of arbitrators a man with the expertise to understand your complaint and a man that you believe, from his background, is not biased one way or the other, then you have a very good forum for hearing your problem.

Ms. SCHROEDER. If it is nonbinding, though, and the agency refuses to go along with it, then you would assume everybody would have to go the other route; right?

Mr. JULIE. Well, this is something that I think your committee should consider. In order to make this as painless as possible, I introduced the terminology "nonbinding." However, if—most arbitration proceedings are binding. And so I would think it could go either way.

Ms. SCHROEDER. The Government always has their legal services fairly much paid for. That is not as inhibiting. So, anytime they lost, wouldn't you just be adding on to the final court cost? Wouldn't the tendency be to put the wagons in a circle and say, all right, sue us?

Mr. JULIE. I would personally favor binding arbitration. This is a rather new idea. It just came when I realized I was invited to testify.

I discussed it with Tom Devine, who pointed out there is a precedent for arbitration in some area of the Federal Government—I am not sure which—and I don't remember whether the nonbinding language came from that or not.

I, personally, would favor binding arbitration, which is typical of arbitration agreements.

Ms. SCHROEDER. You state that whistleblowers should be provided total immunity even if there is wrongful behavior.

Do you think that would be abused? If you had heard our witnesses yesterday, they would have gone around the chandelier.

Mr. **JULIE.** Let's examine what happens when an ex-member of the Mafia provides information in return for immunity. He is pardoned for all of his wrongdoing. I don't think a whistleblower is equivalent to ex-members of the mafia, but I don't see why they shouldn't get benefit of that pardon in return for giving valuable information.

I don't think very many of them would abuse that privilege.

Ms. **SCHROEDER.** Since you were once a Federal employee and or a whistleblower and you found out that the protections were not adequate: Do you think Federal workers being able to sue their supervisors would have been better? Or could you have done that at the time you were a Federal employee?

Mr. **JULIE.** I don't know what the law was at the time. I just gave up and got another job.

Ms. **SCHROEDER.** What branch were you in?

Mr. **JULIE.** I worked as a civilian engineer for the Signal Corps. I really don't think that the whistleblower is litigious by nature, and I think it would be desirable for punishments to be meted out to supervisors, not necessarily to enrich the whistleblower but to establish the point that prohibited practices should cease.

And the suggestion I made about mandatory transfer of abusers is to break up usually what is a little nest of rather nasty people and just have them go—one to Alaska, one to Puerto Rico—and just spread them out as far apart as you can get them, to create, to restore a healthy climate to an agency.

Collecting fines them them, that is a fine idea. I would be in favor of it.

Ms. **SCHROEDER.** Yesterday, we heard all sorts of testimony saying that this isn't needed; that there are very few whistleblowers; that they are not fearful of reprisal, and so forth.

I take it that your grassroots organization would not agree with that, or you probably wouldn't be there.

Mr. **JULIE.** That is right. We regularly state that government procurement waste alone, not including Interior Department waste or other areas of government—government procurement waste alone is running $60 billion a year. This is recoverable waste. Most of that is waste that has been reported or is known about by government employees and could be stopped if we allowed the whistleblower to do his job. And so that is not insignificant waste.

Sixty billion dollars a year would make up for a lot of the things we are trying to scratch out of Gramm-Rudman-Hollings. So, we think it is a very major amount of money.

Ms. **SCHROEDER.** Has this bill been introduced in the House yet?

Mr. **JULIE.** Yes; that has been introduced by Congresswoman Boxer. We have something like 23 cosponsors.

Ms. **SCHROEDER.** Thank you very, very much for being here. We appreciate your time and effort.

Mr. **JULIE.** Thank you.

Ms. **SCHROEDER.** The next witness we have this morning is Ms. Carol Bonosaro, who is the Chair of the board of directors of the Senior Executives Association.We welcome you and are pleased to have you.

STATEMENT OF CAROL BONOSARO, ACTING EXECUTIVE DIRECTOR, SENIOR EXECUTIVES ASSOCIATION

Ms. BONOSARO. I wish to thank you, Madam Chairwoman, for the opportunity to present our views on H.R. 4033, your legislative proposal to strengthen the protections available to Federal employees against prohibited personnel practices.

We have examined your bill in some detail, and have a number of specific points we would like to make. In general, however, we believe it appropriate to strengthen the Office of Special Counsel, and to clearly establish that the Special Counsel is there for the purpose of protecting the employee who is harmed by a prohibited personnel practice, not primarily for prosecuting individuals selected by the Special Counsel.

As you know, the Office of Special Counsel must perform a balancing act. It must protect the rights of employees, while at the same time not overburdening agencies and managers with defending themselves against unsubstantiated allegations.

As always, the pendulum is never exactly in the center. To date, the pendulum we believe has clearly been on the side of the perpetrators of prohibited personnel practices, rather than on the side of employees who have been harmed. We do not believe it appropriate, however, for the pendulum to swing too far back to the other side, because neither position is desirable.

Because of that, we have a problem with the Special Counsel's office establishing a lawyer-client relationship with individual government employees. Even though Department of Justice attorneys may sometimes establish such a relationship—when a Government employee is being sued by a private citizen for his official actions—the relationship can be terminated by the Department of Justice under a variety of circumstances. That does not appear to be a right available to Special Counsel under this bill.

The Special Counsel should be an advocate for the employee when he is harmed, but he should not be an employee's hired gun. An attorney has an ethical responsibility to vigorously pursue the interests of his or her client. To place such a burden on the Special Counsel could in some instances not be in the public interest.

Turning to the specifics of the legislation, we note that there is expanded authority for the Merit System Protection Board and the Special Counsel to issue subpoenas at "any installation or facility of the Government of the U.S. throughout the world." We think this is a laudable provision, and one which should solve some of the problems of the past.

Section 1204(d)(2) now authorizes the Board to order withholding of pay from presidential appointees who are confirmed by the Senate for failure to comply with MSPB orders, as is now the case for other employees, a provision which was not included in the prior legislation. We have no objection to this provision, and in some instances believe it to be necessary.

In subsection (e)(2) of this same section, we note that the Board can declare a provision of a rule or regulation invalid if it encourages an employee to commit a prohibited personnel practice. While we are not experts in this area, it certainly appears to be a vague standard, and we wonder as to its wisdom.

New section 1205 now provides for advanced stays for longer periods of time, and in some instances permanent stays until the Board has finally ruled on the validity of a personnel action taken against an employee when a prohibited personnel act or practice has occurred. We have no objection to this provision and do not believe it will create an undue hardship.

For a number of years, the Foreign Service Grievance Board rules have provided for proscriptive relief for employees of the Foreign Service, and neither the State Department nor other agencies have encountered substantial hardships accommodating themselves to this type of relief.

Again, in section 1212, while we agree that the Special Counsel's office should represent an employee, we do not believe that they should actually establish an attorney-client relationship and act as legal counsel. Subsection (c) of section 1212 would also give the attorneys of the Special Counsel's office the authority to represent the office in any civil actions brought in connection with their functions.

If the office were to establish an attorney-client relationship, it is conceivable that the office could view its obligation as attorney for an employee to bring a civil action on behalf of the employee. Again, we just do not believe this is sound public policy.

We do not understand the significance of subsection (d)(3) of section 1212 which authorizes the Special Counsel to obtain judicial review of MSPB orders in U.S. District Court, while employees in another section are required to utilize the Federal circuits. We think this should be clarified, and that review should be in the same courts for the Special Counsel and employees.

We note that throughout the bill the standard of proof required of the Special Counsel or the employee when alleging that a whistleblower prohibited personnel practice has occurred is substantial evidence, while in all other cases the burden is by a preponderance of the evidence. We think this is reasonable.

Agencies are only required to prove removal cases against employees involving performance by substantial evidence, and yet must prove adverse actions involving conduct cases by a preponderance of the evidence. Since employees are subject to differing standards of proof in different types of adverse actions, we think it appropriate that agencies be subject to differing standards in differing prohibited personnel practice cases.

We are very much in favor of the provisions of subchapter 3 giving employees an individual right of action where prohibited personnel practices have occurred. In too many instances, we have seen career executives and employees subject to punitive personnel actions for prohibited reasons where the Special Counsel has taken no action, and the courts have refused to review the matter, deferring to the Special Counsel's jurisdiction. This has created a substantial hardship for employees, and subchapter 3 would solve this dilemma.

We grant that the number of cases brought initially will be substantial, and not all of them will have merit. However, over a period of time employees and their representatives will recognize the limitations which the law imposes on them, and will not bring cases which are not justifiable.

Section 1222 allows for actual and punitive damages to be assessed against an agency which fails to comply with MSPB orders. While we are not personally familiar with situations where agencies have abused their authority in this matter, so long as the damages are collectable from the agency and not individual employees, we have no objection.

Section 4, "Reprisals," amends section 2302(b)(9) to add a number of new protections. One would make it a prohibited personnel practice to take any personnel action against an employee for failing to follow orders to disobey or not enforce a law. The old principle in supervisory-employees relations that an employee should obey now and grieve later is a solid and proven principle. Allowing employees to make on-the-spot determinations that they have the right to refuse to follow an order because they determine they are being asked to disobey or not enforce the law is much too broad, and would, in our opinion, create chaos in the workplace.

There are sufficient protections in this bill to provide remedies for employees who are asked to commit wrongful acts. We think placing in the hands of the employee the right to be insubordinate and disobedient to a supervisor is not a good principle, and one which should not be enacted into law.

Madam Chairwoman, we thank you for the opportunity to testify on this most important piece of legislation. We would be happy to answer any questions that you or members of your committee might have by submitting written responses. It has been a pleasure being here today.

Thank you.

Ms. **Schroeder**. Thank you very much. We appreciate your being here.

I just wondered if you could tell us what the experience of members of your organization has been with the Office of Special Counsel.

Ms. **Bonosaro**. Well, as you know, we do not represent individuals, and so, in large part, our experience is based upon the information that our members share with us about their own experiences. And I think that the testimony you heard earlier this morning is an accurate reflection of what we have heard from our own membership.

Ms. **Schroeder**. I thought your statement about refusing to follow illegal orders was interesting. And I wondered if you see no circumstance under which an employee should be given the right to refuse to follow such an order. It is kind of a Nuremberg theory.

Ms. **Bonosaro**. I would like to reserve the right to give you a written response, as well, but I think, as you can imagine, the difficulty of having employees all arriving at individual interpretations of the law is what concerns us, and doing that in an on-the-spot way.

I grant you, there may be some situations where it is absolutely clearcut. But, at this point, I would prefer to stand by the testimony and give it additional thought and provide a written response.

Ms. **Schroeder**. My understanding is if the employee deemed it an illegal order and it turned out not to be, then they wouldn't have the protective covering. It is not as if you can run around and pick and choose and label anything illegal. We felt that it would be adequate to prevent creating massive civil disobedience, supervisors' day, or whatever.

But I would be interested to see where you come out.

Ms. **Bonosaro**. Let us reexamine that provision and provide you further thoughts.

Ms. **Schroeder**. Also, you state that you don't want Special Counsel to be the attorney for the person involved. I am sure you have heard some of the testimony about how Special Counsel has really proceeded to ruin people's careers by releasing evidence, and so forth, as they try to find jobs later on in other agencies. I don't see how we prevent that except by establishing privileged relationship so they cannot harm the person later on.

Ms. **Bonosaro**. Well, I think our concern, as stated, is, as you know, the attorney-client relationship is a very particular, very special one, with the sole interest of the client in mind. I think we would prefer to take a look at the bill, and see if we have any other suggestions we might make as to how you might achieve the end of providing protection to the whistleblower short of establishing that kind of relationship.

Ms. **Schroeder**. I think it is important, too, to point out that there has been so much misinformation about what that meant. That doesn't mean they have to protect every person that walks in. They have the right to say you don't have a case. And I think maybe Special Counsel overdid the panic.

Ms. **Bonosaro**. Well, I think we understand that, although they may not. But perhaps we can look at it and offer suggestions as to other ways in which to strengthen protections for the victims.

Ms. **Schroeder**. Thank you very much for being here this morning. We appreciate it. We look forward to working with you in the future as we have in the past. Thank you.

The final witness we have this morning is Mr. David Sanasack, executive director of the Federal Managers Association.

You have been very patient. We thank you for being here, and we will put your entire statement in the record. We are eager to hear what you have to say.

STATEMENT OF DAVID W. SANASACK, EXECUTIVE DIRECTOR, FEDERAL MANAGERS ASSOCIATION, ACCOMPANIED BY CATHERINE BALL, LEGISLATIVE COUNSEL

Mr. **Sanasack**. I am David Sanasack, executive director of the Federal Managers Association. I am accompanied by Catherine Ball, our legislative counsel.

We appreciate the opportunity to testify on H.R. 4033, the Whistleblower Protection Act of 1986. It became clear at the hearings you held last summer that there were serious problems with the Office of Special Counsel. One of the most serious was the fact that the present Special Counsel saw himself as a protector of the merit system, but not a protector of the people that make up the merit system. As Mr. O'Connor so aptly put it, "Justice is not my business. Enforcement of the law is."

The Federal Managers Association is pleased that you did not decide to try to abolish the Office of Special Counsel. Although whistleblowing is not a good way to run the Government and our goal should be that there be no need for whistleblowers, these people put their careers on the line, and they must be protected. Your bill solves many of the inadequacies of the present Office of Special Counsel.

Specifically, it makes clear that the Office of Special Counsel's role is to protect Federal employees. It provides for new rights for Federal employees by stating that an employee on his/her own can file a complaint with the MSPB when affected by a prohibited personnel practice. It allows suit before the MSPB for actual and punitive damages caused by an agency's delay in compliance. We heard some sad cases last summer where employees had been harmed in this way and had no remedy against the wrongs. It provides for protection for witnesses in whistleblower cases.

On the whole, this bill addresses the concerns of our association. There are a few points we would like to make, however, from our perspective as managers:

One: Section 1212(e)(2) appears to be quite open-ended. Do we want OSC to have no restrictions in hiring the OSC staff?

Two: Section 1214(e) states that no disciplinary action can be taken against an employee "for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel." We can see how such a broad term as "any related activity" might be abused by an employee. We suggest that the language be narrowed.

Three: Reprisals: Section 2302(b)(9)(D) states that an employee with authority may not take an action against another employee as a reprisal "for failing to follow orders to disobey or not enforce the law." This seems to create some confusion, since generally the rule in labor law is act now, grieve later. That is, an employee generally must follow the orders of his/her supervisor first, and if that person has a problem with the order, there is generally some type of grievance procedure to deal with it. Suggesting that there is some right inherent in failing to follow orders, regardless of what the order is characterized as, is troublesome.

We would be happy to work with your subcommittee on these areas of concern. Again, thank you and your staff for your efforts on behalf of Federal employees.

[The statement of Mr. Sanasack follows:]

STATEMENT OF
THE FMA
BEFORE THE
SUBCOMMITTEE ON CIVIL SERVICE
HOUSE COMMITTEE ON POST OFFICE AND CIVIL SERVICE
ON
H.R. 4033, THE WHISTLEBLOWER PROTECTION ACT OF 1986
FEBRUARY 21, 1986

Madam Chair, I am David Sanasack, Executive Director of the Federal Managers Association. I am accompanied by Catherine Ball, our Legislative Counsel.

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FMA is pleased that you did not decide to try to abolish the Office of Special Counsel. Although whistleblowing is not a good way to run the government and our goal should be that there be no need for whistleblowers, these people put their careers on the line, and they must be protected. Your bill solves many of the inadequacies of the present Office of Special Counsel. Specifically:

- it makes clear that the Office of Special Counsel's role is to protect Federal employees.
- it provides a stay of personnel action for 60 days, a more reasonable timeframe than 15, and offers a stay on action that "is to be taken", offering prospective relief. In addition, the stay continues until the Board issues its final decision, a point raised several times at last

year's hearings.

- it separates the Special Counsel from the MSPB, realizing the role the Special Counsel should play as an employee advocate.
- it allows the Special Counsel to seek review of MSPB decisions in the Federal district courts.
- it states that the Special Counsel can't release information relating to a disclosure that has been returned to an individual.
- it requires that if the Special Counsel terminates an investigation of a prohibited personnel practice, the Special Counsel must share the findings of fact and the reason for termination with the person who made the allegation. In addition, if the agency moves to reverse or cancel the prohibited personnel practice, the Special Counsel must permit the individual to state whether he/she agrees with the findings and that individual may file "supplementary comments".
- it lightens the burden placed previously on whistleblowers by changing the standard of evidence to "substantial evidence".
- in disciplinary actions, an employee may appeal Board action to the U.S. Court of Appeals. (We appreciate the fact that you did not specify the Federal Circuit Court of Appeals because that forum has not been helpful in Federal employee cases.)
- it provides for new rights for Federal employees by stating that an employee on his/her own can file a complaint with the MSPB when affected by a prohibited personnel practice.
- it allows suit before the MSPB for actual and punitive damages caused by an agency's delay in compliance. We heard some sad cases last summer where employees had been harmed in this way and had no remedy against the wrongs.

- it provides specifically for protection for witnesses in whistleblower cases.

On the whole, this bill addresses the concerns of our Association. There are a few points we would like to make, however, from our perspective as managers:

1. Sec. 1212(e)(2) appears to be quite open-ended. Do we want OSC to have no restrictions in hiring the OSC staff?

2. Sec 1214(e) states that no disciplinary action can be taken against an employee "for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel". We can see how such a broad term as "any related activity" might be abused by an employee. We suggest that the language be narrowed.

3. Sec. 4 Reprisals.

Sec. 2302 (b)(9)(D) states that an employee with authority may not take an action against another employee as a reprisal "for failing to follow orders to disobey or not enforce a law". This seems to create some confusion, since generally the rule in labor law is "act now, grieve later". That is, an employee generally must follow the orders of his/her supervisor first, and if that person has a problem with the order, there is generally some type of grievance procedure to deal with it. Suggesting that there is some right inherent in failing to follow orders, regardless of what the order is characterized as, is troublesome.

We would be happy to work with your subcommittee on these areas of concern. Again, thank you and your staff for your efforts on behalf of Federal employees.

Ms. **Schroeder**. Thank you very much. Again, we appreciate your hanging in here.

The OPM yesterday testified that they were concerned that by offering protection to whistleblowers we would create more insubordination and have management nightmares.

You are management. Do you see this bill as a nightmare?

Ms. **Ball**. Well, I think we pointed out the concerns that we have in the bill. We don't see it as a nightmare. There are lots of managers who are whistleblowers, also, and we think it is important for these people to have protection. And we generally support the bill.

Ms. **Schroeder**. I think you are right; that with good management, you don't have whistleblowers. Sometimes management gets caught up with it, so it goes on and on and on.

In essence, what you are saying is there is a need for this, and we need to proceed to see what we can possibly do.

Do you think managers are afraid to reveal waste because of reprisals? Are you aware of any manager cases?

Ms. **Ball**. I think that as far as whistleblower managers, they fall in with the rest of the employees. I think that there is fear.

Ms. **Schroeder**. Or fear that will be their last promotion.

That is the prior testimony. Everybody can document one promotion based on whistleblowing, and that is it. That is pretty frightening.

I think basically we have covered it all. If I think of something else, we will get in touch with you. But we appreciate your being here, and thank you very much.

Mr. **Sanasack**. Thank you.

Ms. **Schroeder**. With that, we have come to the end of our witnesses, and I thank everybody for their attendance. I appreciate it. And, as I say, luckily the subcommittee has very, very good leadership with Congressman Horton, on the minority side, and hopefully we will be able to come up with a bill in a very short order and report it to the floor.

Thank you very much.

[Whereupon, at 11:03 a.m., the subcommittee adjourned, subject to the call of the Chair.]

[The following statements were received for the record:]

STATEMENT OF

ROBERT M. TOBIAS
NATIONAL PRESIDENT
NATIONAL TREASURY EMPLOYEES UNION

Madame Chairwoman and distinguished members of the Subcommittee:

I am Robert M. Tobias, National President of the National Treasury Employees Union. NTEU is the exclusive representative of over 120,000 active and retired Federal workers. I am happy to speak in favor of the proposed legislation in general and to one provision in particular.

The Office of Special Counsel has been an unequivocal failure insofar as protecting whistleblowers. Statistics indicate that ninety-nine percent of whistleblower cases are closed without the OSC initiating any disciplinary or corrective active. This, of course, involves only those willing to file with the OSC. An MSPB study shows that from 1980 to 1983, the percentage of Federal employees who failed to report agency problems due to fear of reprisal grew from 20 percent to 35 percent. On behalf of my members, I can tell you that the MSPB figures are a gross understatement.

When the Civil Service Reform Act was enacted, we were hopeful that the Special Counsel would become a fierce advocate for employees complaining of waste and prohibited personnel practices. Instead it is now only a paper tiger. Sadly, the OSC has ceased being a viable alternative for employees with such complaints.

NTEU has virtually stopped filing or advising our members to file with the Special Counsel. This is a result of our frustration with the OSC's inability to resolve problems and its relationship with the employee viz a viz the MSPB. The result is not simply a loss to the employee but to the efficient operation of our government.

Let me give a brief example. The Internal Revenue Service is one of the agencies we represent. As you are aware, last year's tax filing season was a well publicized failure. Amidst staffing cut-backs and computer foul-ups were allegations that employees improperly handled and shredded returns, sometimes under the direction of their supervisor. Employees aware of these problems were understandably reluctant to speak out. There should have been a secure method for them to deliver their complaints, but there was not. Rather than speak with the Office of Special Counsel, those willing to speak preferred to deal with the news media using darkened images and disguised voices for their interviews.

The ineffectiveness of the Special Counsel stems from its confused role. Although it purports to be an advocate for employees, it serves under and answers to the MSPB. While it obstensibly protects the identity of employees, it does not protect the information which employees provide.

Because of all these problems, I am pleased to support this bill and urge that it be enacted. The Special Counsel will have the opportunity to operate as an independent agency, with its own clear mission. The power to seek and receive stays will be greatly strenghtened and the Special Counsel will be able to appeal its own cases to federal court. These provisions will put both a real and perceived bite into the OSC's ability to remedy waste and prohibited personnel practices.

The bill also makes clear that the Special Counsel is to act as legal counsel on behalf of employees alleging prohibited personnel practices. The OSC will finally be given the unambiguous direction to represent employees. The ensuing lawyer-client relationship should resolve many of the reservations that employees have in reporting waste and abuse.

There is one provision, through, that I believe will have the greatest value in the proposed bill. That provision concerns the right of an individual employee to bring action under Section 1221, which resolves several critical problems.

The first problem is the lack of merit which the Special Counsel has found in its screening of whistleblower complaints. Although the tools of the OSC to protect employees under this bill will be greatly improved, no one knows whether the Special Counsel will be more aggressive in its use of these tools. Employees must not be forced to rely upon the action or inaction of the OSC when adversely affected by a prohibited personnel practice. The bill properly recognizes that employees, at their option, should choose whether to go through OSC or pursue a complaint on their own.

In addition, the bill also remedies a significant legal hurdle in the pursuit of these complaints. There is a line of federal court decisions which interpret the provisions on prohibited personnel practices too broadly. Specifically, the U.S. Court of Appeals for the District of Columbia issued a decision in Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983), which contained dicta expanding the jurisdiction of the Special Counsel. Personnel actions were divided into three categories. One category involved prohibited personnel practices as being within the exclusive jurisdiction of the Special Counsel. If a claim involves a prohibited personnel practice, this decision virtually eliminates direct access by individuals to the federal courts for its review.

This Carducci reasoning has been expanded in other cases which have further restricted individual access to the courts. We have recently filed an amicus curiae brief at the U.S. Supreme Court (Docket No. 85-969) on such a case. In Gray v. Office of Personnel Management, ___F.2d___ (D.C. Cir. 1985; Docket No. 83-00354), the Court of Appeals upheld a decision by the District Court to dismiss an action under the Administrative Procedures Act. The Gray case involved a refusal to reclassify an administrative law judge position into a higher grade. The Court found, based upon Carducci, that any alleged arbitrary behavior, even if filed under a different statute, should be a prohibited personnel practice under the exclusive jurisdiction of the Special Counsel. (If the subcommittee desires, we will supply a copy of our brief to further explain this dilemma).

While this may sound like a technical legal argument, the results are important. By expanding the definition of prohibited personnel practice, individuals have been stripped of the right to go to court for review of arbitrary personnel actions. Clearly, Congress did not intend to limit review of personnel actions when it passed the Civil Service Reform Act.

Therefore, we welcome the provision that provides for an individual right of action. In addition, we believe the following points should be addressed to fully strengthen this part of the bill:

- There should be an entitlement included in the bill for an individual to go to court when the MSPB fails to take any action within a stated time frame. This right exists in other bills such as Title VII, EEO, where an individual may seek judicial review after 180 days without an administrative decision. The right to go to court should not be undermined by the potential inaction of the MSPB.
- It should be clarified, at least in the legislative history, that the corrective action power of the MSPB and the courts is the power to "make whole." This will avoid any conceivable insecurity as to MSPB and judicial authority to award back pay and any other appropriate relief.
- It should be clarified in the bill that an appeal from a U.S. District Court decision be made to the appropriate regional Circuit Court of Appeals. This will avoid any confusion as to whether an appeal would be at the regional circuit or at the federal circuit.

This bill is a worthy effort to protect whistleblowers and strenghten the government. I thank you for your support in this area.

STATEMENT FOR THE RECORD
BY MARK D. ROTH, GENERAL COUNSEL
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Before the Civil Service Subcommittee
House Post Office and Civil Service Committee

Madam Chairwoman:

We thank you for this opportunity to present the views of the American Federation of Government Employees, AFL-CIO (AFGE), on H.R. 4033, a bill to strengthen the protections available to Federal employees against prohibited personnel practices and for other purposes. AFGE represents approximately 700,000 employees in agencies throughout the Government.

We have added yet another year to the historical base on which to assess the effectiveness of the mechanisms established under the Civil Service Reform Act to protect whistleblowers. It goes without saying that your continuing concerns about and recognition of the inadequacies of the present statutory provisions intended for the protection of employees who are subjected to reprisal for disclosure of fraud, waste and gross mismanagement are well-founded.

There is not a simple solution which will achieve results satisfactory to all.

With respect to H.R. 4033, the Whistleblower Protection Act of 1986, if one focuses on the premise of providing protections for whistleblowers, some of the provisions of the bill are beneficial. Nevertheless, we are of the opinion H.R. 4033 fails overall in its attempt to strengthen redress for whistleblowers. This is so for two very fundamental reasons. First, prohibited personnel practices are still confined to the narrow definition of 5 U.S.C. §2302. That definition limits redress. Employees who make disclosures and who are then subjected to retributive employer activity not falling within the definition are precluded from seeking redress under the Act. Secondly, the procedural mechanism under both existing law and H.R. 4033 require that the whistleblower prove his case before the Special Counsel and then again in a hearing context before the MSPB. This is onerous. But the solution is simple. There is absolutely no reason why a whistleblower should have to prove his case twice. If allegations of a prohibited personnel practice under §1206 are made to an independent authority such as the Special Counsel, and if that authority's own investigation substantiates the allegation, then immediate corrective action should be ordered and enforced. Only in instances where subsequent disciplinary action is sought under §1207 against an employee accused of committing a prohibited personnel practice is a hearing necessary. In such cases, the hearing should only reach the degree of culpability, if any, of the employee and determine the appropriate penalty. It should not, as is the case now, amount to a trial of the whistleblower.

H.R. 4033 moves only slightly in this direction by making the Office of Special Counsel a completely separate entity. However, in the case of whistleblowers, the Special Counsel still is limited in power to investigating prohibited personnel practices (§1212(a)(4)), and when "appropriate" only initiating petitions for stays (§1212(a)(2)). The whistleblower who has been reprised against must first convince the Special Counsel that there are "reasonable grounds to believe that a prohibited personnel practice has occurred, exists or is to be taken". (§1214(a)(1)). If the whistleblower succeeds in convincing the Special Counsel, then the Special Counsel must still convince the MSPB who makes a final determination. It would be far more equitable to the whistleblowers, who will otherwise face costly and strenuous adversarial hearings where he or she, the whistleblower and not the allegations, is put on trial, to provide the Special Counsel, and not the MSPB, with the authority to order stays and also corrective actions when he believes a prohibited personnel practice has occurred, exists or is about to be taken. We have found that the greatest deterent to coming forward is the spectre of the financially and emotionally draining adversarial hearing.

We are of the opinion that the substantial evidence standard provided in §1214(a)(3)(B)(i) for whistleblower cases is an improvement. This standard has been interpreted by the Supreme Court to mean "such relevant evidence as a mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). However, we can find no rationale for providing for a different standard of proof with respect to the other prohibited personnel practices. The preponderance of the evidence standard maintained in H.R. 4033, §1214(B)(3)(b)(ii) has proven to be burdensome.

The provisions of H.R. 4033 for imposing corrective action are an improvement. We especially support the change which would permit salary withholding for any employee, including Presidential appointees who fail to comply with an order of the MSPB.

In summary, H.R. 4033 does strengthen to a limited degree the protections of whistleblowers in the area of stays, evidentiary standards, sanctions and compliance. However, so long as whistleblowers are still forced to become involved in adversarial hearings before the anti-employee MSPB, we do not believe that the bill really provides any incentives which would encourage more persons who have knowledge of mismanagement and waste to come forward nor does it provide insight into any avenues of tangible cost savings to the government. The proposal basically addresses only the person who has suffered reprisal for whistleblowing and it still places that person on trial, first to prove his case before the Special Counsel and then before the MSPB. This situation is not cured by permitting employees to take their cases directly to the MSPB (§1221). All that does is to negate the role of the Special Counsel which we believe should actually be further strengthened at the expense of the MSPB's involvement in these cases. If an individual is dissatisfied with the Special Counsel's role, we would recommend providing for de novo review in the District Court. We note that H.R. 4033's judicial review provision, §1221, does not define whether de novo review is available.

While we cannot give an unqualified endorsement to H.R. 4033 at this time, we recognize your continued efforts and the efforts of the Subcommittee to remedy some of the inherent flaws in this area. We appreciate the opportunity to present our views and hope that our comments will be useful as further consideration is given to this matter and that they will be included in the record.

Very truly yours,

Mark D Roth

Mark D. Roth
General Counsel

TESTIMONY OF THE

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

The National Association of Government Employees is a part of the 850,000 member Service Employees International Union (AFL-CIO).

As the Chair is well aware, whistleblowers are one of government's most important tools for discovering waste, fraud and abuse. In the most recent past whistleblowers more than any other source have been responsible for bringing to public attention the wholesale waste and abuse in our procurment system, saving the nations taxpayers millions of dollars. Too often rather than receiving a reward for uncovering waste fraud and abuse the whistleblower has been subject to reprisal and punishment.

Under the Civil Service Reform Act the power to protect federal employees from such reprisals has been centered in the Office of Special Counsel. The ability, determination and motivation of OSC to protect whistleblowers from harrassment has been wholly absent. The OSC has been almost totally derelict in the performance of it's statuatory mission, spreading frustration, distrust, and even charges of corruption in it's wake. These problems have arisen both as a result of the personal philospophy of the Sepcial Counsel and because of the statuatory structure of OSC.

Madam Chair we support HR 4033 legislation which strenghtens the OSC, and clarifies it's statuatory role of protecting the federal employee from prohibited personnel actions.

Most fundamentally the bill clarifies that the OSC role is to protect federal employees, not to advise management on how to succeed in committed prohibited personnel actions within the framework of the act. The bill also seperates the OSC from the MSPB, an action of symbolic as well as real importance which should help assure greater independance for OSC. The OSC would under the bill be permitted to seek review of MSPB decisions in the federal District Courts. Individuals are provided with enhanced rights under this bill. An employee could file a complaint with the MSPB on a prohibited personnel act in his own behalf and would not be forced to rely on the OSC. The bill would also require that when the Special Counsel terminates an investigation that he/she share the findings of fact and law with the whistleblower. Employees would also be provided with a measure of confidentially in dealing with OSC with provisions which would prevent the Special Counsel from releasing information relating to a disclosure that was returned to an individual. The legislation also lessens the standared of evidence placed on whistleblowers attempting to demonstrate a prohibited personnel practice to the universally used "substantial evidence". The legislation also provides for an appeal from MSPB decisions to the US Court of Appeals. It also allow for employee to collect actual, and punitive damages caused by an Agencies delay in compliance.

These as well as other provisions should provide adequate protections to whistleblowers facing retaliation. The time for enacting such protection is long overdue.

We applaud the Chair for her continued leadership to provide justice to whistleblowers facing retaliation. We pledge the cooperation of our office in passing this important legislation.

Comments of H.R. 4033
"Whistleblower Protection Act of 1986"

by Robert G. Vaughn, A. Allen King Scholar
and Professor Law, Washington College of Law
The American University
March 4, 1986

Thank you for the opportunity to comment on the Whistleblower Protection Act of 1986. The bill is an important one because the Office of Special Counsel was one of the foundations of the Civil Service Reform Act of 1978. The Reform Act could risk expanding administrative discretion in the provisions regarding the Senior Executive Service, Merit Pay, decentralization of personnel authority, and performance based actions because the Office of Special Counsel promised an effective way of insuring that this increased authority would not be used for improper purposes. Indeed, one of the fundamental principles of civil service law is that power should be limited by the purpose for which it is granted.

Through prohibited personnel practices the Reform Act defined the improper uses of personnel authority. Many of these prohibited personnel practices incorporated existing rules but the whistleblower provision, 5 U.S.C.§2302(b)(8) established an important new right. The right of federal employees to expose specific types of official wrong doing enjoyed bipartisan support in Congress. Given the anticipated difficulties of protecting whistleblowers, the vindication of the right required an effective Office of Special Counsel. The importance of the Office of Special Counsel and the vindication of the public and private rights contained in the whistleblower provision argue for a reexamination of the protections contained in the Act. I would first like to make some general observations about the bill and then to discuss in more detail some of its specific provision. Particularly, I want to emphasize the need to clarify the existing law regarding the right of federal employees to disobey illegal or unconstitutional orders.

A. General Comments:

The most basic change which the bill makes is the provision for petitions by employees to the Merit Systems Protection Board for stays and for corrective actions. The bill provides for a method of enforcement and protection resting with the affected employee. In many ways this alternative avenue of enforcement is analogous to similar private enforcement for the violation of anti discrimination provisions by federal agencies but is not as broad since the bill only provides for judicial review of Board decisions rather than for *de novo* actions in federal court. Given the limitations on resources of the Office of Special Counsel, the character of prosecutorial discretion, and the importance of the interest protected an alternative enforcement mechanism is warranted.

The two basic objections to this scheme seem to me to be: 1) the burden on the Board as a large number of employees seek stays or corrective action regarding a range of agency actions not now within the jurisdiction of the Board and 2) the delay generated by the procedures are likely to discourage agencies from exercising personnel authority. The bill addresses these concerns by providing a different standard when an employee seeks a stay of a personnel action, the employee must meet a standard analogous to that required for a preliminary injunction in federal court. This rather demanding standard should reduce the burden on the Board by enabling it to dispose of some cases rather rapidly. The risk of delay to agency procedures is likewise reduced. The bill applies a similar standard to continuance of a stay obtained by the Office of Special Counsel when an employee appeals to the Board under §7701.

The employee's right to seek corrective action will place some additional burden on the Board, principally because corrective action proceedings will involve some personnel actions not now appealable to the Board. However, given the importance of protecting employees from prohibited personnel practices, this additional burden seems justified. Moreover, if employees have confidence in the Office of Special Counsel, it will provide an important screening function. Employees may likely credit a candid but sympathetic assessment of the merits of their cases.

Since the protections against prohibited personnel practices, in part, substitute for the private tort action which federal employees enjoyed for violations of constitutional rights, there should be greater willingness to make the administrative remedy a fully effective one.

The bill should clarify the procedures applicable to both employee requests for stays and for employee requests for corrective action. If section 7701 procedures are to be applied in employee requests for a stay, the bill should indicate this. It may be that a 7701 hearing is not necessary in determinations regarding stays.

The modifications of the powers and responsibilities of the Office of Special Counsel do not create risks and burdens not accepted already in the law. The Office of Special Counsel would still provide a screening function. Therefore, it is important that the bill remove the "shall" language in §1214(b)(2)(A) which indicates that once the Special Counsel takes a case, the Office has no discretion in deciding whether to seek corrective action.

The provisions regarding attorney fees and costs, the right of judicial review, and expanded obligations of the Office of Special Counsel to those who seek its assistance fit well with the purpose of the existing law and with the goals of this legislation. Let me now turn to some comments that I have on specific provisions of the bill.

B. Comments on Specific Provision:

My comments on specific provisions of the bill go not to the advisability of the legislation but rather to some specific, sometimes minor, problems.

1. Covered Personnel Actions

Under the Reform Act prohibited personnel practices apply only to listed personnel actions. The danger of such a listing is that it will exclude important actions and that it is difficult in such a list to anticipate every circumstance that arises. Indeed, the list of prohibited personnel actions excludes reductions in force which some legislative history suggests Congress specifically sought to cover. Moreover, the early reports of the Office of Special Counsel stated that actions not covered, such as an agency requiring an individual to report for a psychological fitness for duty examination, could be the source of abuse.

The legislative history of the Reform Act suggests to me that Congress intended a broad coverage of prohibited personnel practices. Indeed, in the listing of covered actions, the Congress included something analogous to reduction in rank, a personnel action excluded from the adverse action sections of the Reform Act.

One revision which is consistent then with the purposes of the Act and which serves to vindicate the wider authority of the Office of Special Counsel would be to a abolish the listing of covered actions and cover any circumstance in which agency action taken for a prohibited reason adversely affects an employee. A similar definition of covered actions occurs in some labor legislation.

2. Role of the Office of Special Counsel

In the Congressional findings is the statement that the Special Counsel should have an attorney-client relationship with a person seeking redress through the Office. Consistent with the provisions of the bill, this statement emphasizes that the foremost role of the Office is the protection of employees, with special obligations to those who come to the Office for help. This statement then contains a definite Congressional view of the role of the Office.

Also involved in this statement is an emphasis on the duty of the Office to protect confidentiality because confidentiality is the basis of the attorney-client relationship. Moreover, the statement requires the Office to maintain a sympathetic, yet professional attitude, toward those who seek its help.

While this statement is only a Congressional finding and is therefore not enacted into law, I believe it suggests a number of important things about the role of the Office of Special Counsel. The only reservation I have is that the body of law surrounding the attorney-client relationship may be inconsistent with some of the provisions of the Reform Act and of the bill. For example, the Reform Act suggests a view confidentiality not as stringent as the attorney-client privilege. Moreover, the disciplinary authority of the Special Counsel would be troubling if placed in the hands of private party's attorney.

3. District Court Review

The bill provides that review of decisions regarding stays and requests for correcting actions in cases brought before the Board by the Office of Counsel and by employees will be before a United States District Court. Although the bill is not clear, presumably review will be under those standards applicable now to appellate review. The approach of the bill deviates from the review provisions of the Reform Act which placed review in United States courts of appeal. Indeed, Congress specifically rejected the previous practice of judicial review of Civil Service Commission decisions by United States district courts. Not only does the judicial review provisions incorporate this rejected position, but it also increases the confusion and complexity of the review provisions since most Board decisions would continue to be reviewed by the United States Court of Appeals for the Federal Circuit and in a few instances by other United States courts of appeal.

4. Disciplinary actions by the Office of Special Counsel.

The bill provides an opportunity to clarify two issues that arise in regard to disciplinary actions brought by the Office of Special Counsel. First, the bill could clarify whether the Board may impose more than one of the penalities contained in 5 U.S.C. §1207(b). The legislative history of the Reform Act and an analysis of the circumstances in which the penalities are to be applied clearly make preferable the broader interpretation of the Board's power. Second, the United States Court of Appeals for the Federal Circuit has held that an employee charged by Special Counsel may not recover attorney fees under the standards of 5 U.S. C. §7701(g)(1) if the employee prevails in the action. (Saldana v. Merit Systems Protection Board 766 F.2d 514 (Fed. Cir. 1985)). Fairness would suggest that the attorney fees provision of section 7701(g)(1) apply to employees subject to disciplinary action by the Special Counsel as well as those charged by an agency.

5. Exhaustion of Administrative Remedies

A somewhat strained but possible interpretation of §1223(a) might require that an employee exhaust his or her remedies before the Office of Special Counsel before proceeding directly to the Board. The bill should clearly state that no such exhaustion requirement is intended.

6. Disability Retirements

Since the applicability of Section 7701 to disability retirements remains an open question, the bill should insure that appeals of these decisions also fall within §1205(a)(4)(B).

7. Penalties for Non Compliance

The bill seeks to provide an individual action for agency failure to comply with an order of the Board. The remedies provided, actual and punitive damages, suggest that torts standards would be used by the Board, but it is not clear which torts standards. Therefore, proof of negligence could be required before an employee could recover actual damages resulting from a delay in agency compliance. Also the term, actual damages, is likely to raise the question of whether damages are limited to out of pocket losses, economic losses, or includes pain and suffering and emotional harm. While there is variation among the states regarding the standards for punitive damages, the torts standards seems to require at least willful or wanton, or reckless conduct. The standards need to be clarified and perhaps thought given to recompensating the employee for delay in ways other than drawing on the torts standards.

C. The Right to Disobey

The prohibited personnel practices, particularly the whistleblower provision, protect not only employees but also citizen from abuses of the power of government. The bill recognizes the right to disobey an illegal order, a right that also protects federal employees and citizens from the abuse of power.

I believe that the right to disobey an illegal or unconstitutional order should be one of the sources of pride of a democratic government. In fact at least one federal court has concluded that the right of public employees to disobey an order that violates the constitutional rights of a third party may itself be grounded in the constitution. Harley v. Schuykill County, 476 F.Supp. 191 (E.D. Pa. 1979). The bill needs to articulate the standard for disobedience because the standard may itself is a principal point of dispute. The two basic views vary regarding what an employee must show in order to be protected against a charge of insubordination. One view states that an employee must show that 1) the order was in fact illegal 2) the employee had a reasonable basis for believing that the order was illegal and 3) the employee acted in good faith. The other view argues that an employee should be protected even if the order is eventually upheld if the employee reasonably believed in good faith that it was illegal at the time the employee disobeyed.

The Board seems to have taken a third and more restrictive view. The Board's cases can be interpreted as holding that an employee is not protected if the order is in fact illegal and the employee acted with reasonable belief in good faith. The employee is not protected unless some formal determination of its illegality has been made prior to the time that the employee disobeyed. See, Gragg v. Department of the Air Force, M.S.P.B. Docket No. DA07528316484 (Nov. 20, 1984); Mode v. TVA, M.S.P.B. Docket No. AT07528210202 (Apr. 2, 1984)("even an invalid policy must be complied with and later challenged through appropriate means"). The Federal Circuit has not examined the issue in detail but its position seems consistent with that of the Board. See, Bielow v. Department of Health and Human Service, 750 F.2d 962 (Fed. Cir. 1984) (dispute regarding the legality of the order is not a basis for refusing to follow it).

I believe that a careful analysis of the interests of public employees, of public employers, and of the public support protection for an employee who refuses to obey an order which the employee has a reasonable basis to believe is illegal or unconstitutional when the employee acts in good faith. Given the risks that a public employee takes by following an illegal order, the interests of the employee argues for application of the reasonable belief, good faith standard. The public employer's efficiency interests argue for a more limited standard although a good deal of modern personnel literature suggests that institutions accepting dissent and inquiry may in fact be more efficient. However, the government has an interest in insuring that government officials operate within the bounds of legality. The public has a particularly strong interest in standard which encourages resistance to illegal orders and places an additional barrier to the abuse of government power.

While I support a clarification of the standard for disobedience, I do have reservations above the language that provides protection for failing to follow an order not to enforce a law; for this language suggests a review of a range of administrative discretion not within the Board's expertise. The risk is that the Board would become a type of administrative court. Incidentally, the standards for disobedience would not necessarily require the Board to finally determine the legality of an order since the employee would be protected if there were reasonable grounds for the belief that the order was illegal.

The Whistleblower Protection Act of 1986 recognizes the importance of protecting employees, particularly whistleblowers, from prohibited personnel practices. The bill strengthens the Office of Special Counsel and provides protected employees with a right of action before the Board. The propose of the bill is important and the bill seems to address concerns that might arise. Some specific changes could improve the bill, the most important being an articulation of the standard giving rise to the right to disobey illegal or unconstitutional orders.

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13 March 1980

Patricia Schroeder, Chairwoman
U.S. House of Representatives
Committee on Post Office and Civil Service
Subcommittee on Civil Service
122 Cannon House Office Building
Washington, D.C. 20515

Dear Representative Schroeder,

Thank you for the copy of H.R. 4033, the Whistleblower Protection Act of 1980. I have read the proposed bill and as there have already been extensive reviews of the proposed bill presented to the subcommittee, I would like to focus my comments on two areas which I believe need to be considered.

First, a federal employee would have much more protection from retaliation if he were able to take his case directly to court rather than go through what are often biased reviews by agency representatives. The Merit System Protection Board and Special Counsel protect the rights of the management system rather than search for truth in revelations made by whistleblowers.

Second, an area completely overlooked in the bill is payment to the whistleblower for damages to his/her personal mental or physical health. My case studies have demonstrated that most whistleblowers suffer a major damage to their psyche when they experience retaliation from a government agency. If the agency would consider the information provided by the whistleblower rather than mount an attack against her/him, everyone would benefit. My experience has been, however, that most agencies do not listen, but rather take retaliatory action. I would recommend that the Subcommittee consider payment to assist the whistleblower to restructure his/her life after the government managerial system has destroyed the whistleblower's career.

Quite often after the whistleblower's career has been ruined, he/she is left to fend for himself and to repair his/her mental health. Even though the citizens of the U.S. may have benefited greatly from the disclosure, the whistleblower becomes a "professional leper." Often he/she is left without a career after telling the truth. I believe this bill needs to provide for payments to individuals for damages suffered. One option would be to allow the whistleblower to receive Workers Compensation if medical evidence supports this remedy.

I believe that the Subcommittee should carefully consider the emotional and physical effects of whistleblowing on the individual and consider the addition of some way for the whistleblower to be provided with insurance coverage and/or funds to rehabilitate himself.